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No. _____

# IN THE
# SUPREME COURT OF THE UNITED STATES
October Term, 1997

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**ANTHONY J. LOBUE AND THOMAS KULEKOWSKIS,**
***Petitioners,***

**v.**

**JOSEPH G. DILEONARDI, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS,**
***Respondent.***

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Must a federal court in a kidnapping prosecution defer to relevant state family law regarding custody over, and competence of, the alleged victim?

2. Are legal guardians, like parents, exempt from prosecution under the federal kidnapping statute?

## LIST OF PARTIES

Petitioners Anthony J. Lobue and Thomas Kulekowskis were the subjects of an extradition proceeding before the magistrate judge, and were habeas petitioners in the District Court and appellants in the Court of Appeals. Respondent Joseph G. DiLeonardi, United States Marshal for the Northern District of Illinois, was the habeas respondent in the District Court and the appellee in the Court of Appeals. Also subjects of the extradition proceeding before the magistrate judge were Anthony DeSilva, Albert DeSilva, and Judith Schon.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case September 26, 1997.

## OPINIONS BELOW

The opinion of the Magistrate Judge is reported at 881 F. Supp. 1126 and reproduced in the Appendix at 34a. The opinion of the United States District Court for the Northern District of Illinois granting habeas corpus is reported at 941 F. Supp. 741 and reproduced in the Appendix at 12a. The opinion of the Court of Appeals is reported at 125 F.3d 1110 and reproduced in the Appendix at 1a. Its order denying rehearing and rehearing in banc is unreported and is reproduced in the Appendix at 84a.

## JURISDICTION

The judgment of the Court of Appeals was entered September 26, 1997. Appendix at 1a. A timely petition for rehearing was denied November 26, 1997. Appendix at 84a. A timely application for an extension of time within which to file a petition for a writ of certiorari until April 15, 1998 was granted by Justice John Paul Stevens on January 27, 1998. Appendix at 85a. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

The federal kidnapping statute, 18 U.S.C. § 1201, is reproduced in the Appendix at 87a.

## STATEMENT OF THE CASE

### A. The Facts

On May 24, 1988, an Illinois state court, after a hearing, found that Tammy DeSilva was mentally incompetent as a result of a December 1987 car accident that had caused her severe brain damage and left her a quadriplegic. S.R. 1 (DX 13).[1] Tammy was represented at the hearing by a court-appointed guardian *ad litem*. Tammy's parents, Mr. and Mrs. Wright, had received notice of the guardianship hearing, and Mr. Wright appeared there by counsel, but neither of Tammy's parents applied to become her guardian; only Tammy's husband, Anthony, did so. S.R. 1 (DX 1, 6). At the hearing, the court considered uncontradicted medical evidence showing that Tammy was, in the words of the doctor who examined her, "totally incapable of making personal and financial decisions." S.R. 1 (DX 11). And the court so found. S.R. 1 (DX 13). Accordingly, the court appointed Anthony as Tammy's plenary guardian, endowing him with full responsibility for all decisions relating to the care of Tammy's person or to her financial affairs. *Id.*

Acting in his capacity as Tammy's guardian, Anthony temporarily moved Tammy to Canada – where the couple owned a home and where Tammy, as a Canadian citizen, could receive free medical care. S.R. 1 (DX 29, 33). (The costs of Tammy's care in the United States since the accident

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[1] The volumes that constituted the supplemental record on appeal below are referred to as "S.R. 1" and "S.R. 2." The original record on appeal below is referred to as "O.R. Lindberg" or "O.R. Shadur," with the names "Lindberg" and "Shadur" referring to the two District Judges who were, at different times, assigned to the case.

had been so great that Anthony, who worked as a jockey at a Chicago racetrack, had been forced to apply for public aid, and to ask his parents to take Tammy into their home, where they spent over $50,000 on her care. S.R. 1 (DX 29-30, 33)). Anthony was unable to move to Canada with Tammy because he could not find steady work there, so he and Tammy's mother, Mrs. Wright, agreed that Mrs. Wright would live in the couple's home and care for Tammy while Tammy was in Canada. *Id.*

In June 1988, acting in his capacity as guardian, Anthony initiated a tort suit in Illinois on Tammy's behalf to recover damages for the injuries she had suffered in the car accident. S.R. 1 (DX 33). As the tort suit progressed, it became necessary for Tammy to travel to Illinois to undergo a medical examination for the suit. Anthony retained a registered nurse to care for Tammy during the trip. Anthony feared that the Wrights, who wanted Tammy to stay with them in Canada, would object to the trip. For this reason, Anthony's attorney in the tort suit, Timothy Touhy, asked petitioners – two heavily-decorated Chicago police officers with spotless records and more than 50 years' combined experience – to accompany Anthony and the nurse to ensure that Anthony could peaceably transport Tammy, his ward, from Canada to Illinois for the necessary medical examination. *See* S.R. 1 (DX 20, 33, GSX 3 at 6, 9, 10, 11); O.R. Lindberg 22 ¶¶ 4-5.

Petitioners agreed to accompany Anthony, Tammy, and the nurse on the trip to Canada and back without any compensation, solely as a favor to Mr. Touhy, their longtime friend. *Id.* Petitioners checked with Mr. Touhy beforehand to ensure that transporting Tammy was legal. *Id.* In addition, at petitioners' behest, Mr. Touhy contacted Canadian police authorities by telephone to ensure that even

if the Wrights complained to the police, the trip would still be allowed to go forward. *Id.* Mr. Touhy then reported to petitioners that based on Anthony's guardianship order and Mr. Touhy's conversation with Canadian police authorities, there would be no violation of law if petitioners, Anthony, and the nurse transported Tammy as planned. *Id.*

Thus, on February 3, 1992, Anthony, with petitioners and the nurse, attempted to transport Tammy from Canada to Illinois for the medical examination. After petitioners picked Tammy up at the couple's home, Mrs. Wright called the Canadian police and told them a kidnapping had occurred. U.S. authorities then stopped petitioners at the border and questioned Tammy through a computer keyboard, the only means by which she can respond. S.R. 1 (GX062, GX068-69). Based upon Tammy's mutually contradictory answers – which suggested that Tammy wanted both to be with Anthony and to be with her mother, *id.*—Tammy was sent back to Mrs. Wright in Canada, and petitioners were directed to return to the United States.

Later in 1992, a Canadian court appointed Mr. and Mrs. Wright as Tammy's guardians, finding (just as the Illinois court had earlier) that she was incompetent to make decisions on her own behalf about the care of her person and her financial affairs.[2] When Mrs. Wright had claimed a

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[2] Both of the Wrights had earlier passed up the opportunity to apply to become Tammy's legal guardian in the Illinois proceeding in which Anthony was appointed. See supra, pp. 2-3. The Seventh Circuit, in the decision below, briefly suggested in dictum that the Wrights, as Canadian citizens, "were automatically excluded" from the Illinois guardianship proceeding – but it chose not to "pursue the subject," basing its holding on a different ground. DeSilva v. DiLeonardi, 125 F.3d 1110, 1114 (7th Cir. 1997). In fact, contrary to this dictum, the Wrights were not excluded from the guardianship proceeding but were fully able to participate therein. Mr. Wright appeared there by counsel; no part of the proceeding

kidnapping by petitioners, she had asserted, in effect, that Tammy was being transported despite the fact that she knowingly had withheld her consent to travel. Yet in support of their guardianship application, the Wrights now submitted affidavits from two doctors who concluded, respectively – just as every court and doctor to assess Tammy's mental condition since the accident had concluded – that (1) Tammy was "unable to make any rational decisions," S.R. 1 (DX 23), and (2) Tammy "exhibited impaired mental reasoning . . . [and] is incapable of managing her own affairs." S.R. 1 (DX 24).

In February 1993, the Wrights finally transported Tammy to the United States for the medical examination necessary to the tort suit Anthony had brought – over a year after Anthony had wanted the examination to be performed. S.R. 1 (DX 26, 36). The neuropsychologist who conducted the examination concurred in the finding of every other court or doctor ever to address the question: Tammy is not capable of meaningfully exercising the power to consent, and needs a guardian to do so on her behalf. S.R. 1 (DX 36). Tammy ultimately prevailed in the suit that Anthony had brought, which resulted in a settlement for her of over $3 million dollars.

Based on Mrs. Wright's complaint, Canada now seeks to extradite Anthony and the petitioners and to prosecute them for kidnapping, a crime punishable in Canada by life imprisonment.

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occurred ex parte; the Wrights were free to, and did, object to the appointment of Anthony as Tammy's guardian; and either of the Wrights could have been appointed Tammy's guardian had he or she been willing to reside where Tammy then lived, in the United States. See 755 Ill. Comp. Stat. 5/11a-5(a) (requiring that guardian be United States resident, but not United States citizen).

**B. The Magistrate Judge's Ruling**

The extradition proceeding was brought before a magistrate judge sitting in the Northern District of Illinois. As the magistrate judge noted, according to the Extradition Treaty between the United States and Canada, extradition may be granted only when "dual criminality" exists – meaning that the conduct at issue constitutes an offense punishable under the laws of both Canada and the United States. *In re Extradition of Kulekowskis*, 881 F. Supp. 1126, 1135-40 (N.D. Ill. 1995).

To assess whether the conduct at issue here is punishable under U.S. law, it is necessary to consider a hypothetical, reversed fact scenario under which the relevant conduct would have occurred in the United States. *Id.* In this hypothetical scenario, Anthony, armed with a *Canadian* guardianship order with precisely the same procedural pedigree as the actual Illinois order, would have attempted to transport Tammy *from Illinois to Canada* for the medical examination. *Id.*

The magistrate judge held that such an attempt would have violated Illinois' kidnapping statute, despite the procedurally proper Canadian guardianship order. *Id.* The magistrate judge acknowledged that a procedurally proper Canadian guardianship order could be accorded comity and recognized by an Illinois court and that such an order, if recognized, would bar an Illinois kidnapping prosecution. *Id.* at 1139-40. Nevertheless, the magistrate judge held that because a Canadian guardianship order might not be recognized in Illinois, such an order did not constitute an "absolute bar" to an Illinois kidnapping prosecution, and that therefore dual criminality was still technically satisfied "even if the chance of actual prosecution, conviction and

punishment [in the hypothetical scenario] were remote." *Id.* at 1140.

### C. The District Court's Ruling

On habeas corpus, the district court reversed the magistrate judge's ruling, holding that the government had not carried its burden to show "dual criminality." *Kulekowskis v. DiLeonardi*, 941 F. Supp. 741, 745-50 (N.D. Ill. 1996). The district court accepted petitioners' argument that their conduct would *not* have constituted a U.S. offense, under either federal or Illinois law. *Id.* And, after an extensive discussion of the relevant law, the district court specifically reversed the magistrate judge's ruling that the conduct at issue could give rise to a valid Illinois prosecution for kidnapping, holding instead that a guardianship order like Anthony's would bar such a prosecution. *Id.*

In so doing, the district court initially noted the strong presumption favoring the recognition of foreign judgments. *Id.* at 747. It then held that an Illinois court faced with a Canadian guardianship order would have been bound to apply the four-part test for the recognition of foreign judgments that this Court set forth in *Hilton v. Guyot*, 159 U.S. 113, 166-68 (1895). *Kulekowskis*, 941 F. Supp. at 748. Under this test, the court held, a foreign judgment will be recognized if "[(1)] the rendering court had jurisdiction over the person and subject matter; [(2)] there was timely notice and an opportunity to present the defense; [(3)] no fraud was involved; and [(4)] the proceedings were according to a civilized jurisprudence." *Id.* (quotation omitted). Applying this four-part test, the district court found that:

> First, there clearly would be personal and subject matter jurisdiction since [Anthony] and Tammy resided in the forum state. Second, the Wrights had notice and opportunity to present a defense. Mr. Wright appeared at the guardianship hearing through counsel while Mrs. Wright, after being served with notice of the proceedings, consulted with Tammy's *ad litem* appointed guardian who represented her at the hearing. Third, no suggestions of fraud have been advanced. Fourth, there is no doubt that a proceeding identical to the Illinois hearing would qualify as being conducted in accordance with civilized jurisprudence.

*Id.* at 748. For these reasons, the district court concluded that a valid Canadian guardianship order with the procedural pedigree of the order at issue here would certainly be recognized by the Illinois court. In addition, the district court concluded that such an order, once recognized, would legally bar a kidnapping prosecution. *Id.* at 745-50. Accordingly, finding that dual criminality was lacking, the district court issued the writ of habeas corpus in petitioners' favor. *Id.* at 750.

### D. The Court of Appeals' Ruling

After a two-page discussion, the Seventh Circuit reversed the district court's dual criminality ruling, holding that the conduct at issue constitutes an offense under United States (specifically, federal) law. *See DeSilva v. DiLeonardi*, 125 F.3d 1110, 1113-14 (7th Cir. 1997). It did not discuss the Illinois kidnapping statute. *Id.* Nor did it disturb the

district court's holding that a hypothetical Canadian guardianship order procedurally identical to the actual Illinois order at issue here would be recognized in the United States as the legal equivalent of a U.S. state court guardianship order. *See id.* Instead, the sole basis for the Seventh Circuit's decision was that a legal guardian violates the federal kidnapping statute, 18 U.S.C. § 1201, if he tries to transport his ward interstate or internationally over her protests. *See DeSilva*, 125 F.3d at 1114. The Seventh Circuit made crystal clear that its holding rested solely on its interpretation of § 1201 by stating that "[o]ne federal criminal statute [§ 1201] is the *only* law we need discuss," and that it need not "pursue" other possible grounds of decision. *DeSilva*, 125 F.3d at 1114 (emphasis supplied).[3]

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[3] The Seventh Circuit also suggested in dictum that "the kind of orders involved here would not necessarily have been enforced even within the United States." Id. This dictum is in error. There is no reason to think that the kind of guardianship order at issue here, which was procedurally unimpeachable, would not have been enforced within the United States. Indeed, to suggest otherwise leads to absurdities – implying, for example, that Illinois courts routinely issue procedurally defective guardianship orders that do not deserve to be recognized abroad. The Seventh Circuit's belief that this procedurally impeccable order might not be enforced was apparently based on its factual misimpression that the Wrights, as Canadian citizens, had been "automatically excluded" from the guardianship proceeding, see DeSilva, 125 F.3d at 1114, but this belief is entirely mistaken. See supra n.2. Further, in referring to "orders," the Seventh Circuit's dictum refers both to Anthony's guardianship order and to another, ex parte Illinois court order, which by its language authorized petitioners to transport Tammy from Canada to the United States. However, in arguing that their conduct did not constitute an offense, petitioners have relied upon only the guardianship order – which was issued after notice and a hearing – not the separate, ex parte order, which is irrelevant here.

The Seventh Circuit also separately held that the extradition statute is constitutional despite a possible separation-of-powers challenge, although this issue had been neither briefed below nor

Interpreting § 1201, the Seventh Circuit held that a federal court in a kidnapping prosecution is not bound to defer to a valid state court guardianship order, for such an order "may show that a state judge believed that the ward lacks the mental capacity to give or refuse consent, but what a state judge believes is not conclusive in the federal prosecution." *Id.* The Court also separately held that legal guardians, unlike parents, are not exempt from § 1201. *Id.* Thus, it concluded that "a guardian who moves an adult ward across state or national boundaries, against her will, . . . may be convicted of kidnapping." *Id.* at 1115.

## REASONS FOR GRANTING THE WRIT

This case presents a fundamental federalism question as to which the Circuits are divided: whether state family law (here, guardianship law) deserves deference in a federal kidnapping prosecution. It thus raises the issue whether State courts and legislatures have exclusive power in the intimate and quintessentially local family law setting, or whether – as the decision below held – federal courts may second-guess the States, reconsidering and revising family law determinations that the States have already made.

To hold, as the court below did, that federal courts in kidnapping cases may ignore state family law, including state court judgments, sets a dangerous precedent that contradicts well-established principles of constitutional federalism law. As Chief Justice Rehnquist has stated, family law should remain the exclusive province of the States, which enjoy the benefit of over two centuries of

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resolved by the district court. Petitioners do not cite this holding here as a reason to grant certiorari.

experience in the area – for "[i]f ever there were an area in which federal courts should heed the admonition of Justice Holmes that 'a page of history is worth a volume of logic,' it is in the area of domestic relations." *Santosky v. Kramer*, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

This case also presents a second important issue: whether legal guardians are exempt from prosecution under the federal kidnapping statute. The decision below held that they are not. Yet the phrase "guardian kidnapper" should be an oxymoron. Legal guardians are granted custody over incompetent adults precisely so that they can make important decisions (such as whether and when to travel) on their wards' behalf and in their wards' best interests. Thus, legal guardians exercise by proxy their incompetent wards' power to give and withhold consent in *every* area – from contracts to trusts to surgical procedures to medications to housing – even when the ward strenuously disagrees. Travel should be no exception. However, according to the decision below, the phrase "guardian kidnapper" is not an oxymoron; it is a description of a potential felony defendant. Under that decision, a legal guardian who transports his incompetent ward over the ward's protest – even for a beneficial end, such as, here, Tammy's medical examination for her tort suit – can still be found to have "kidnapped" the ward and thus be subject to a federal prosecution in which he faces possible life imprisonment.

Thus, the decision below raises important issues of law both when it holds that a federal court is not bound by state family law in a federal kidnapping case, and when it holds that a legal guardian may be prosecuted for transporting the very incompetent ward for whom he is deputized to be a plenary proxy decisionmaker. On each of

these issues, the Circuits are split. And, on each, the Seventh Circuit, in the decision below, falls on by far the worse side of the split – in light of this Court's decision in *Chatwin v. United States*, 326 U.S. 455, 460 (1946). In *Chatwin*, the Court's analysis showed that federal courts *must* defer to state family law in federal kidnapping cases. And, in *Chatwin*, the Court expressly equated parents with legal guardians of incompetent adult wards which logically entails – that legal guardians of incompetent adult wards must share the same immunity from kidnapping prosecution that parents already indisputably enjoy. The Seventh Circuit's decision thus conflicts so sharply with *Chatwin* that not just certiorari, but also summary reversal, is warranted here.

## I. THE CIRCUITS ARE SPLIT AS TO WHETHER A FEDERAL COURT IN A PROSECUTION FOR KIDNAPPING MUST DEFER TO RELEVANT STATE FAMILY LAW

The Circuits are split as to whether a federal court, in a prosecution under the federal kidnapping statute, 18 U.S.C. § 1201, must defer to state family law relevant to the competence of, and custody over, the alleged kidnapping victim.

The federal kidnapping statute, 18 U.S.C. § 1201, states in pertinent part that:

> Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when . . . the

> person is willfully transported in interstate or foreign commerce . . . shall be punished by imprisonment for any term of years or for life . . . .

18 U.S.C. § 1201(a). Thus, in a prosecution under the statute, the government must show that a transportation was performed "unlawfully." Case law interprets this requirement as demanding a showing that the alleged victim was an "unconsenting person," as the court below acknowledged. *DeSilva*, 125 F.3d at 1114 (collecting cases).

This Court has held that, for purposes of the kidnapping statute, if a person cannot consent for him or herself, then the power to grant and withhold consent shifts to his or her legal proxy: "If the victim is of such an age or mental state as to be incapable of having a recognizable will, the [act alleged] then must be against the will of the parents or legal guardian of the victim" to constitute an offense. *Chatwin v. United States*, 326 U.S. 455, 460 (1946). However, the Circuits have split as to whether the inquiry that triggers the shift of the consent power under *Chatwin* – whether "the victim is of such an age or mental state as to be incapable of having a recognizable will" – may be resolved by relevant state family law.

### A. Two Circuits Refuse To Follow State Family Law In a Federal Kidnapping Case.

As described above, the Seventh Circuit held here that state family law (specifically, a state court guardianship order embodying a prior, valid state court custody and mental incompetence determination) is of no weight in resolving *Chatwin*'s issue of whether the alleged victim in a kidnapping case is of such age or mental state as to be

incapable of having a recognizable will. *See DeSilva*, 125 F.3d at 1114. A federal court, it held, must decide this issue *de novo*, as a factual matter. *See id.* The Seventh Circuit so held in this case even though the state court guardianship order at issue had a perfect procedural pedigree. And, it so held even though the state court incompetency determination on which that order was based, which recognized the severity of Tammy's brain damage, has been consistently echoed and affirmed by every doctor and court that has considered whether Tammy is competent, both before and after the purported "kidnapping."

Like the Seventh Circuit, the Second Circuit has held that state family law (specifically, state statutory or common law presumptions that children of a given age are incompetent to give consent) is of no weight in resolving the issue of whether consent should shift to a proxy decisionmaker under *Chatwin*. *See United States v. Macklin*, 671 F.2d 60, 64 & n.5 (2d Cir. 1982). In *Macklin*, the defendant, Dennis Macklin, picked up a thirteen-year-old runaway named Bruce Rowe on the streets of Los Angeles and took him to New York City, where they slept in the open in Central Park. *Id.* at 62. Then, at a city swimming pool, in New York City, the defendant picked up an eleven-year-old girl named Selestine Valdez, who joined the defendant and Bruce in sleeping in Central Park for several nights. Finally,the defendant, leaving Bruce in New York, took Selestine with him to Philadelphia, where he was arrested. *Id.* at 62-63. Macklin was subsequently prosecuted for kidnapping Bruce and Selestine.

Bruce and Selestine's parents stated that "they never consented to their children's travelling with Macklin." *Id.* at 63. Nevertheless, the Second Circuit – holding that the

parents' failure to give consent was not enough – reversed Macklin's kidnapping conviction. It noted that:

> [T]he government contends that, although consent or acquiescence of the alleged victim is normally a complete defense to a kidnapping charge, when the victim is a minor it is the will and consent of the parent or parents which govern.

*Id.* But, it rejected the government's theory, holding that this theory, as reflected in the jury instructions the trial court had given, improperly substituted the will of the minors' parents for that of the minors themselves. *See id.* at 64.

In so holding, the Second Circuit failed to look to the statutory and common law of the States in which Bruce and Selestine resided (California and New York, respectively) relating to the age at which those States judge minors to have the capacity to consent on their own behalf. Nor did it heed *Chatwin*'s directive that the majority rule in the States is that the age at which a child may consent to travel is fourteen – three years older than Selestine was at the time. Instead, it simply ignored relevant State law and reversed the defendant's conviction – holding, incredibly, that Selestine, an eleven-year-old girl, could validly consent to travel interstate, without her parents' consent, with a man who was not related to her, whom she had never before met, and who had just suggested that they sleep outdoors in Central Park together. *See id.*

These two Circuit decisions are the predictable result of ignoring state family law – statutory, common law, and decisional – in a federal kidnapping prosecution. This is

what happens when unelected federal judges substitute their judgment in the place of the rich body of law that has developed over 200 years as a result of the work and thought of state and local legislatures, lawmakers, and judges. In contrast, as the following section shows, decisions in those Circuits that *do* follow state family law in federal kidnapping cases reach reasonable, justifiable outcomes, properly informed by the States' views on children's maturity and on the status of parents.

### B. Two Circuits Follow State Family Law In A Federal Kidnapping Case.

The Eighth Circuit looks to state family law (specifically, common law with respect to the age at which children are competent to give consent) to resolve *Chatwin*'s issue of whether the alleged victim in a kidnapping case is of such age or mental state to be incapable of having a recognizable will. *See United States v. McCabe*, 812 F.2d 1060, 1061-62 (8th Cir. 1987) (citing *Chatwin*, 326 U.S. at 461 n.4 (collecting state common law cases)); *see also Miller v. United States*, 123 F.2d 715, 716 (8th Cir. 1941) (looking to Arkansas law to determine when a person is considered a "minor" for purposes of the federal kidnapping statute).

In *McCabe*, the defendant, Darrell Lee McCabe, took a twenty-three-month-old child named Bo Sandness away from his father, with whom the defendant had an ongoing dispute about who owned a certain Corvette. 812 F.2d at 1060-61. The defendant then traveled with Bo from the child's home in South Dakota to Minnesota, where the defendant was arrested for kidnapping. *Id.* McCabe argued that his conviction should be reversed because the government was required to prove, as a factual matter, not that Bo's father withheld his consent for Bo's travel, but that

Bo *himself* was incapable to consent to travel and did not consent. *Id.* at 1061. The Eighth Circuit noted the majority rule in the States (also cited in *Chatwin)* that incapacity is to be presumed for children under fourteen; assumed that South Dakota would apply this rule; and therefore reasonably concluded that because Bo was not even two years old, all that need be proven was that Bo's father had not consented to travel, not that Bo himself had withheld consent. *Id.* at 1061-62 (citing *Chatwin*, 326 U.S. at 461 n.4). Because Bo's father's lack of consent had been shown, the Eight Circuit affirmed McCabe's kidnapping conviction. Thus, unlike the Second Circuit in *Macklin*, the Eighth Circuit was able to protect a child too immature to consent and affirm a conviction of an exploitive adult – all because it properly looked to relevant state family law.

Like the Eighth Circuit, the Tenth Circuit also looks to state family law in federal kidnapping cases. Thus, it recently held in its *Floyd* decision that persons with the state common-law or statutory status of "surrogate parent" fit the parental exemption to § 1201. *United States v. Floyd*, 81 F.3d 1517, 1523-24 (10th Cir.), *cert. denied*, 117 S. Ct. 144 (1996).

In *Floyd,* the defendant, Franklin Delano Floyd, contended that he was exempt from prosecution for kidnapping because he was the surrogate parent for the alleged kidnapping victim, a child named Michael. Floyd had been married to Michael's mother, Sharon, before she died and for a time had acted as Michael's parent. *Id.* The Tenth Circuit held that a surrogate parent who had fully assumed parental rights and responsibilities would fit within the parental exemption to the kidnapping statute. *Id.* at 1522-24. However, it also held that Floyd himself – who had turned Michael over to the State of Oklahoma when

Sharon died and thereby abandoned his state-law surrogate parent status – was no longer a surrogate parent to Michael, and could therefore properly be convicted of kidnapping. *Id.* at 1525.

Thus, the Tenth Circuit in *McCabe* properly looked to the state family law status of surrogate parenthood (akin to the state family law status of common law marriage) in defining, for purposes of the federal kidnapping statute, both when a parental relationship is created and when it ends. And, by deferring to state family law, it properly afforded protection from kidnapping prosecution to true state-law surrogate parents, but withheld it from those who have abandoned their parental rights.

## II. THE CIRCUITS ARE SPLIT AS TO WHETHER LEGAL GUARDIANS ARE EXEMPT FROM THE FEDERAL KIDNAPPING STATUTE

As noted above, the federal kidnapping statute (as amended) contains an express exception for transportation "of a minor by the parent thereof." 18 U.S.C. § 1201(a). However, even before this amendment, the immunity from kidnapping charges of those with custody over the alleged victim was always beyond cavil. Thus, parents were implicitly immune before they were expressly exempted from the statute's reach. *See United States v. Sheek*, 990 F.2d 150, 152 (4th Cir. 1993); *United States v. Boettcher*, 780 F.2d 435, 437 (4th Cir. 1985).[4] Congress introduced the parental exemption because it recognized this implicit immunity, and knew that no one wanted to see parents

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[4] The express parental exemption was necessary only to clarify that "divorce[d]," non-custodial parents were exempt, see 75 Cong. Rec. 13,296 (1932) (statement of Chairman Dyer).

prosecuted: "There is not anybody who would want to send a parent to the penitentiary for taking possession of his or her own child, even though the order of the court was violated and it was a technical kidnapping." 75 Cong. Rec. 13,296 (1932) (statement of Chairman Dyer).

Parenthood, for purposes of the kidnapping statute, is a relationship of custody under state law, not one of biology. It is beyond question that the term "parent," as used in the statute, would include an adoptive parent, who has been granted custody by a state family court. Conversely, the statute itself makes clear "the term 'parent' does *not* include a person [including a natural parent] whose parental rights with respect to the victim of an offense under this section have been terminated by a final court order" from a state court. 18 U.S.C. § 1201(h) (emphasis supplied).

The Circuits are split as to whether the parental exemption extends not just to parents, but also to legal guardians and others who, by state court order, stand *in loco parentis* to those over whom they have custody. (Put another way, they are split as to whether guardians are implicitly exempt from the statute just as parents used to be). Those Circuits that exempt legal guardians are in the right. To vary Chairman Dyer's plaintive statement, is there anyone who would want to send a legal guardian to the penitentiary for taking possession of his or her own ward? (Here, where the guardian is the husband, and the ward his wife, the question cannot help but take on a special plangency).

### A. One Circuit Denies Legal Guardians An Exemption From the Federal Kidnapping Statute.

In the decision from which this petition is taken, the Seventh Circuit held that, despite the parental exemption, "[a] guardian who moves an [incompetent] adult ward across state or national boundaries, against [the ward's] will . . . may be convicted of kidnapping." *DeSilva*, 125 F.3d at 1115.

### B. Two Circuits Accord Legal Guardians An Exemption From the Federal Kidnapping Statute.

The Tenth Circuit recently stated, in *Floyd*, 81 F.3d at 1523-24, that the parental exemption encompasses a "'person who holds the position or exercises the functions of a parent; a protector, guardian'" or is "acting *in loco parentis*" to his ward. *United States v. Floyd*, 81 F.3d at 1523-24 (quoting *Oxford English Dictionary*, vol. VII at 222 (2d ed. 1989)); *see also Black's Law Dictionary* (5th ed. 1979) (defining "parent" to include person whose "guardian" status "has been established by judicial decree"). In reaching the conclusion that a surrogate parent fits within the parental exception to the statute, the court reasoned that what matters, for parental status, is not biology but whether a quasi-parental relationship exists between the alleged kidnapper and the alleged victim, and whether the alleged kidnapper fulfills the legal "duties" and "responsibilities" of a parent. *Id.*

The Eighth Circuit holds similarly that the parental exception applies to those who "stand[] in a position equivalent to that of a parent." *Miller*, 123 F.2d at 717. In

*Miller*, it emphasized that a stepparent could count as a parent for purposes of the parental exemption, as long as the stepparent took on parental "duties and liabilities" imposed by state family law. *Id.* It reasoned that while "parent," in a narrow sense, denotes "consanguinity," "the term 'parent' in a broad sense" may also extend to certain quasi-parental legal relationships. *Id.* However, it held that the particular defendant at issue – who had not legally adopted the child victim – had not taken on these duties and thus was still effectively a "stranger" to the victim. *Id.*

In an era of adoption, stepparents, surrogacy, and guardianship, these Circuits sensibly did not rely on their own views on these intimate issues, but rather looked to state family law, to define who has a legal status equivalent to that of a "parent."

## III. THE DECISION CONFLICTS WITH A DECISION OF THIS COURT

The decision below conflicts with this Court's decision in *Chatwin*, on both of the issues on which the Circuits have split. *Chatwin* demonstrates that a federal court in a kidnapping case must follow state family law. And, *Chatwin* expressly treats parents and legal guardians of incompetent adult wards as equivalent for purposes of the federal kidnapping statute – thereby entailing the conclusion that legal guardians are, like parents, exempt from the statute's reach. The conflict between the decision below and this Court's decision in *Chatwin* is so sharp, and the injustice to petitioners so pronounced, that not just certiorari, but also summary reversal, is warranted here.

### A. *Chatwin* Requires A Federal Court To Follow State Family Law In A Kidnapping Case

*Chatwin* itself looked to state family law to answer the question that triggers the shift of the consent power to a proxy decisionmaker in a kidnapping case: whether the alleged victim was of such age or mental state to be incapable of having a recognizable will. 326 U.S. at 461. There, the Court addressed the question whether a fifteen-year-old girl could consent to being transported across state lines over her parents' objection. *Id.* It began by looking to the law of the girl's home state, Utah, concerning the legal capacities of fifteen-year-olds, finding in Utah law no suggestion that fifteen-year-olds were not competent to give and withhold consent. *Id. Only then* – after it found no state law basis for presuming a fifteen-year-old's consent ineffective as a matter of law – did the Court go on to require a federal court to make a *de novo* factual determination as to whether the girl herself had the ability to give and withhold consent. *Id.*

In holding that a factual determination of competency was required for a fifteen-year-old, the Court rejected the government's argument that evidence that the girl possessed a "mental age" of seven meant that state statutory and common law presumptions concerning the incapacity of actual seven-year-olds were applicable. *See id.* at 462 & n.5 (collecting cases refusing to apply state statutory presumptions of incapacity for young children to adults for whom there was evidence of low mental age). Importantly, however, the Court did *not* reject these State incompetency presumptions themselves. On the contrary, the Court embraced them – indicating that had the girl's actual, chronological age been not fifteen but seven, it would have

followed Utah's lead; presumed her incapable of giving and withholding consent; shifted the power of consent to proxy decisionmakers (the girl's parents); and then looked to the evidence as to whether her parents had consented on her behalf. *See id.* at 461. Accordingly, the Court cited with approval a series of decisions embracing common law presumptions of incapacity for children below the age of fourteen.

The Court's careful exegesis of Utah statutory and common law in *Chatwin*, would have been entirely pointless had state family law been irrelevant in a federal kidnapping case, as the decision below held. Under *Chatwin*, a federal court in a kidnapping case must first look to state family law and, *only if no state law applies*, must assess the alleged victim's consent power as a *de novo* issue of fact. Thus, the Seventh Circuit got *Chatwin* precisely wrong when it said that *Chatwin* "holds that consent can be given [by the alleged victim]. . . even when state law deems the person transported to be incapable of making an independent choice." *DeSilva*, 125 F.3d at 1114. On the contrary: *Chatwin* holds that if state law deems the person transported to be incapable of making an independent choice, then state law is dispositive and consent *cannot* be given by the alleged victim.

Although *Chatwin* involved state statutory and common law presumptions of incompetency, its analysis applies with even greater force to state court guardianship orders such as the one at issue here, for several reasons. First, the Court's acceptance of state law presumptions of class-wide incapacity for a particular group of persons (those below a certain chronological age) entails its acceptance of state court individualized adjudications of incompetency, on an evidentiary record, for particular persons, as well.

Second, *Chatwin*'s analysis is particularly apt where, as here, not just an incompetency finding, but a state guardianship order premised on such a finding is at issue. Such an order represents not just a one-shot *competency* determination concerning mental capacity, but also a continuing *custody* order, which, *as a matter of state law*, shifts the ward's power to consent in all life decisions regarding the ward's person and financial matters to the guardian, until and unless the order is modified. (For example, even if the ward appears to have regained competence, she still cannot validly sign a contract on her own behalf unless and until she is *adjudicated* competent and the guardianship is terminated by the court). A parent or other guardian has legal custody precisely so that he or she can override his or her ward when the ward voices preferences that she may strongly and sincerely feel at the time, but that are not in her long-term best interests, and retains such custody until a court holds that the power to consent should revert to the ward.

Third, a guardianship order shows that the state court trusts the particular guardian it has selected with the most intimate and momentous decisions in the life of the ward, and has found that it is in the ward's best interests to have her decisions made by this particular guardian – making it all the more anomalous for that guardian later to be branded a "kidnapper."

Finally, as this Court has stated, state court judgments have full *res judicata* effect in federal court: "[i]t is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren School Dist. Bd. of Educ.*,

465 U.S. 75, 81 (1984) (applying Full Faith and Credit Act, 28 U.S.C. § 1738).

Thus, *Chatwin* requires that a federal court in a kidnapping case (as here) look to state family law, whether statutory, common law, or decisional. The Seventh Circuit opinion below therefore directly conflicts with *Chatwin* when it ignores state family law.

### B. *Chatwin* Expressly Recognizes That Parents And Legal Guardians Are Equivalent For Purposes of the Federal Kidnapping Statute, Which Entails That Both Are Exempt From the Statute

In *Chatwin*, this Court expressly recognized the equivalence of "parents" and "legal guardians" of incompetents under the federal kidnapping statute when it discussed proxy decisionmaking. Thus, it stated that, for the purposes of § 1201, "[i]f the victim is of such an age or mental state as to be incapable of having a recognizable will, the confinement [or transportation] then must be against the will of the *parents or legal guardian* of the victim." 326 U.S. at 460 (emphasis added). Moreover, the *Chatwin* Court recognized this equivalence in 1946, after § 1201 had been amended in 1934 to include the parental exemption. *See Gooch v. United States*, 297 U.S. 124, 128 (1936) (discussing amendment).

In equating parents and legal guardians, the Court recognized the parallel structure of the parent/child and guardian/ward relationships. As the Restatement notes, regardless of whether a custody order is parent/child or guardian/ward, it "create[s] the same sort of relationship between the child, or incompetent, and the person to whose

care he is awarded," and is therefore treated the same under the law. *Restatement (Second) of Conflicts of Laws* § 79 cmt. d, at 239 (1971).

Given the Court's holding that parents and legal guardians of incompetents have equal status as trusted proxy decisionmakers, it would be wholly perverse, and contrary to the Court's plain language, if – as the Seventh Circuit held here – the statute did not equally exempt both parents and legal guardians. *This would mean, absurdly, that the very same legal guardian whom a third party would be legally required to consult in order to get proxy consent for the ward's travel could himself commit a federal felony, punishable with life imprisonment, if he traveled with the ward over the ward's protest.*

It is also extremely hard to believe that the *Chatwin* Court – which repeatedly referred to the state statutory and common law backdrop, *see supra* § IIIA – would have countenanced this absurd result, given that state statutes and decisions addressing the question (as well as the Model Penal Code, § 212.1(1962)) *uniformly and without a single exception* exempt guardians from kidnapping and false imprisonment charges.[5] Indeed, to our knowledge, there is not a single case

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[5] See Taylor v. Gilmartin, 686 F.2d 1346, 1352 (10th Cir. 1982) (action cannot be brought against guardian for falsely imprisoning ward); Illinois v. Marin, 269 N.E.2d 303, 306 (Ill. 1971) ("the offense [of kidnapping must] be against the will of the victim or against the will of the victim's parent, guardian or legal custodian"); Hemphill v. Mississippi, 90 So. 488, 489 (Miss. 1921) ("It is inconceivable that a guardian who is entitled to the custody of the person of his [incompetent] ward could be guilty of kidnapping such ward."); Barker v. Washburn, 93 N.E. 958, 960 (N.Y. 1911) (guardian free to move incompetent ward over whom he has custody); Robinson v. Frost, 54 Vt. 105, 111 (1881) (wife may alter domicile of incompetent spouse); Townsend v. Kendall, 4 Gil. 315, 325 (4 Minn. 412) (1860)) (guardian can never be guilty of falsely imprisoning

in the history of the Republic in which a State has ever allowed a legal guardian to be prosecuted for kidnapping. (Nor has the federal government ever allowed this, except here). This is the "page of history," worth a volume of logic, to which Chief Justice Rehnquist referred when he argued for deference to the States in the area of family law. *See Santosky*, 455 U.S. at 770 (quotation omitted) (Rehnquist, J., dissenting) As the *Chatwin* Court knew, this history formed the background against which Congress legislated when it enacted § 1201, and Congress expressed no intent to abrogate the common law on this issue.

For these reasons, the decision below sharply and directly conflicts with *Chatwin* when it holds that parents and legal guardians are not equivalently exempt from § 1201. Further, this conflict is so pronounced that summary reversal is warranted. The Seventh Circuit's decision squarely defied *Chatwin*'s command that parents and guardians be treated alike – as well as an uninterrupted history, dating from the dawn of the Republic, of protection of persons whom the States have endowed with legal guardian status from kidnapping prosecutions. *See supra* n.5. This decision thus inflicted on petitioners a grave injustice that prior law – as well as common understandings of the powers of a plenary guardian such as Anthony – uniformly suggested could never occur.

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ward); N.J. Stat. Ann. § 2C:13-1(d); 18 Pa. Cons. Stat. § 2901(b); Tenn. Code Ann. § 39-13-301(2).

## IV. THE ISSUES ARE FUNDAMENTAL AND RECURRENT

This case raises a federalism issue that is of significant national importance. It also raises family law issues concerning the powers of state-law guardians that are of great personal importance to many individuals.

First, it is a basic principle of federalism that family law is the province of the States. Thus, this Court recently held that the commerce power does not reach "family law (including marriage, divorce, and child custody)." *United States v. Lopez*, 514 U.S. 549, 564 (1995); *see also id.* at 624 (Breyer, J., dissenting) (same). And, this Court similarly made clear long ago that "[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94 (1890).[6] If the States do not have final say in the family law area – the most quintessentially local area there is – then there is very little left to them under our system.

Second, it is important to note that this case matters greatly to guardians *and* their wards. The Seventh Circuit's decision below might appear to be pro-ward, but it is really just the opposite. In refusing to defer to relevant state family law, it will hamstring prosecutions in cases where vulnerable victims such as young children and incompetent adults have

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[6] *See also Thompson v. Thompson*, 484 U.S. 174, 186 n.4 (1988) (same); *McCarty v. McCarty*, 453 U.S. 210, 220 (1981) (same); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (same); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (same); *see also Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (sustaining domestic relations exception to federal diversity jurisdiction).

been kidnapped by ill-intentioned, dangerous third parties. This point is illustrated by the Second Circuit's parallel holding in *Macklin*, which refused even to protect an eleven-year-old girl by presuming her incompetent to consent to travel to another state with a man who was a stranger to her.

In cases where vulnerable victims such as incompetents and young children are involved, the very deference to state family law on the consent issue that the Seventh Circuit rejected is absolutely crucial. Such deference allows the parent or guardian to act as proxy decisionmaker *as a matter of law*, stripping dangerous third-party kidnappers of the defense that the child or incompetent, *as a matter of fact*, consented to be transported. No matter what, before a third party transports a young child or an adjudicated incompetent over state or national boundaries, that third party should be legally required to approach the relevant legal protector – whether custodial parent or guardian – beforehand to get consent, or else face a kidnapping prosecution. The government should not have to prove beyond a reasonable doubt, as a factual matter– as the Seventh and Second Circuits have held it must – that the young child or incompetent was incapable of giving consent in order to shift the power to consent to travel to a proxy decisionmaker, the parent or guardian. Instead, the parent or guardian should have that power *as a matter of state law* – just as he or she does in every other important decision in the child's or ward's life.

Finally, this case is also significant to guardians and wards for another reason: The decision below will predictably hamper wards from receiving the best possible medical care, and prevent guardians from acting in their wards' best interest when to do so requires interstate or international travel. It is a fact of life: Children and

incompetent adults will protest some of the very things that are best for them – sometimes even those that are crucial for their survival. They will fight tonsillectomies or inoculations, and shrink from necessary surgery; they will want to dissipate a trust or invest recklessly; they will not fully understand the consequences of their actions. That is precisely why parents and guardians are state-law proxy decisionmakers for their children and wards. Yet in the area of travel, the decision below transforms what is generally a fiduciary duty – to overrule the ward in his or her own best interest – into a federal offense. The decision below thereby affects (and chills) the guardian who wants to bring a ward with Alzheimer's disease to live with her in another state – knowing that the ward will weep and scream when asked to leave the familiar setting. It equally affects (and chills) the guardian who wants to bring a ward with paranoia or schizophrenia to a state where there is a better psychiatric institution, knowing that the ward will have delusions about what is happening when he is moved.

Fear of prosecution on the part of these beneficent guardians would hardly be speculative. Here, the statute was held to allow felony prosecution, with a possible penalty of life imprisonment, of a guardian and husband who wanted to transport his severely brain-damaged ward and wife temporarily so that she could undergo a medical examination crucial to the lawsuit that he had brought on the wife's behalf – which was the only way she could recover damages for the accident that had disabled her.

## CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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## APPENDIX

**Anthony DeSILVA, Albert DeSilva, Anthony J. LoBue, and Thomas Kulekowskis,**
**Petitioners-Appellees,**
**v.**
**Joseph G. DiLEONARDI, United States Marshal for the Northern District of Illinois,**
**Respondent-Appellant.**

Nos. 96-4110, 97-1038.

United States Court of Appeals,

Seventh Circuit.

Argued May 22, 1997.
Decided Sept. 26, 1997.

Before COFFEY, EASTERBROOK, and ROVNER, Circuit Judges.

EASTERBROOK, Circuit Judge.

Tammy DeSilva barely survived a serious car accident in December 1987. She became a quadriplegic and suffered serious brain damage. Three months after the accident an Illinois court declared her disabled, see 755 ILCS 5/11a-2(a), and named her husband Anthony as her guardian. Tammy's father, Ernest Wright, had sought the position, but the state judge understood Illinois law to forbid the appointment of foreign nationals as guardians. 755 ILCS 5/11a-5(a). Like Tammy, Ernest Wright is a citizen of Canada.

Anthony looked after Tammy during the 16 months following the accident. In July 1989, however, with medical

bills mounting and insurance exhausted, he returned Tammy to Winnipeg, the Wright family's home. There she could receive subsidized health care. Tammy's parents tended her for the next 30 months, living with her in a house that Anthony and Tammy jointly owned. Anthony visited once. Back in Illinois, he initiated litigation seeking damages for Tammy's injuries. The litigation required Tammy to undergo a medical examination. Anthony feared that Tammy's parents would not permit him to return Tammy to Chicago for this purpose. He secured an order from an Illinois court authorizing him "to take custody of the person of Tammy DeSilva, wherever she may be found, for the purpose of presenting her to a physician or medical care provider for evaluation, treatment or assessment." With this order in hand, Anthony set off for Canada, accompanied by his father Albert, two off- duty Chicago police officers petitioners Kulekowskis and LoBue), and a registered nurse. The group arrived at the home in Winnipeg at 6:40 a.m. on February 3, 1992.

What we have recounted so far is uncontested. Other events, and the inferences to be drawn, remain in dispute. Anthony contends that after a "brief and non-violent" discussion with Tammy's mother (Christina Wright), he and his companions carried Tammy to the car and drove back to the border. Tammy "appeared happy to see her husband and content to accompany him, and she indicated no disagreement." Christina Wright called the police and reported an abduction; in response, U.S. customs officials stopped the group at the border. When asked whether she wished to go to Chicago or stay with Anthony, Tammy was indecisive: through her keyboard communication device, she answered, "I want to go home with Anthony if it is OK" but also said that she wished to be with her mother. Customs

officials ultimately sent Tammy back to Canada and admitted Anthony and his group to the United States.

Christina Wright, in contrast, says that Kulekowskis and LoBue barged in without asking permission and disconnected the telephone line while Anthony and the nurse carried Tammy away "crying and kicking." The Government of Canada believes that, at the border, Tammy protested through her communication device that she did not want to go to Chicago with Anthony "[b]ecause it is not home," that Anthony had told her that they were just going "for a ride", and that she would rather live with her mother than with Anthony. When communicating with two Winnipeg police officers, she asked whether "Anthony was doing this for money". Canada also believes that when entering the country the group told customs officials that they were traveling to Winnipeg to attend a surprise anniversary party for Anthony's wife. They did not mention the court order or their plan to remove Tammy from the country.

The Province of Manitoba commenced a criminal proceeding, alleging that the two DeSilvas, Kulekowskis, and LoBue violated Canadian national laws against kidnapping and forcible seizure. The Government of Canada asked the United States to surrender them for trial. The State Department initiated the necessary proceedings. 18 U.S.C. s 3184. Magistrate Judge Bobrick concluded that the evidence, viewed in Canada's favor, requires extradition. *In re Extradition of Kulekowskis*, 881 F.Supp. 1126 (N.D.Ill.1995).

Petitioners then sought writs of habeas corpus. District Judge Lindberg issued writs with respect to three of

the petitioners, holding that Anthony's status as Tammy's custodian would have permitted Anthony to do what he did, if Tammy had been in the United States, and that the "dual criminality" requirement of the treaty with Canada therefore precludes extradition. 941 F.Supp. 741 (N.D.Ill.1996). District Judge Shadur then issued a writ in favor of the group's fourth member, noting in a short opinion that he agrees with Judge Lindberg's legal conclusions. We have consolidated the appeals from these decisions.

Extradition depends on probable cause to believe that petitioners committed an offense covered by the extradition treaty. *Bovio v. United States*, 989 F.2d 255, 258 (7th Cir.1993); *Eain v. Wilkes*, 641 F.2d 504, 507-08 (7th Cir.1981). We cannot resolve factual disputes; for that matter, we cannot address most legal issues pertinent to the charges. Affirmative defenses not specified in the treaty may not be considered. *Charlton v. Kelly*, 229 U.S. 447, 33 S.Ct. 945, 57 L.Ed. 1274 (1913); *Collins v. Loisel*, 259 U.S. 309, 42 S.Ct. 469, 66 L.Ed. 956 (1922). "The alleged fugitive from justice has had his hearing and habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S.Ct. 541, 542, 69 L.Ed. 970 (1925) (Holmes, J.); *see also Eain*, 641 F.2d at 508.

Following the chain of inquiries established by *Fernandez*, we first examine the magistrate judge's jurisdiction. The hearing was held in this case in response to the State Department's decision to respect Canada's request that petitioners be surrendered for trial. Section 3184, which

has existed in roughly the same form since 1878, provides that any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State ... shall certify the [charge], together with a copy of all testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention[.]

The magistrate judge certified the charges under *s* 3184 and left to the Secretary of State the ultimate decision whether to honor Canada's request. Petitioners submit that s 3184 violates Article III of the Constitution and the doctrine of separation of powers "by requiring federal courts to give advisory opinions that are subject to plenary review and revision by the Executive branch." They first raised this argument in an independent action, and a district judge concluded that s 3184 indeed violates Article III, *Lobue v. Christopher*, 893 F.Supp. 65 (D.D.C.1995), but the court of appeals vacated this decision after concluding that the district court itself lacked jurisdiction. A constitutional objection to extradition must be made in the original extradition proceeding, or in a petition for a writ of habeas corpus, the court of appeals held. 82 F.3d 1081 (D.C.Cir.1996).

An argument that certification for extradition is an advisory opinion does not have much force, as magistrate judges do not serve under Article III of the Constitution and therefore are free to issue advisory opinions if a statute requires that step. The current proceeding--the quest for writs of habeas corpus--is anything but advisory. If the writ

issues, it must be obeyed. But even the proceeding before the magistrate judge was an Article III case or controversy. A certificate of extradition is no different from a search warrant or an order approving a deportation: it authorizes, but does not compel, the executive branch of government to act in a certain way. The police may change their mind about the need for a search; the Board of Immigration Appeals may grant the alien's request for reopening. The Constitution itself allows the President to block enforcement of a criminal judgment by issuing a pardon. Judgments give victorious litigants rights but not duties; only the losers are placed under obligations, and a judgment may be called "advisory" only when it does not bind the unsuccessful litigant. A victor in civil litigation may forego collecting the award of damages; no one thinks that this makes the judgment advisory. The police need not search, the Attorney General need not deport, the victorious plaintiff need not collect--and the Secretary of State need not extradite. A federal court had the constitutional authority to certify the petitioners for extradition. Accord, *LoDuca v. United States*, 93 F.3d 1100 (2d Cir.1996) (reaching the same conclusion by a different route).

The second question under *Fernandez* is whether "the offense charged is within the treaty". Under Article 2 of the extradition treaty between the United States and Canada, "[e]xtradition shall be granted for conduct which constitutes an offense punishable by the laws of [Canada and the United States] by imprisonment or other form of detention for a term exceeding one year or any greater punishment." If there is probable cause to believe that Anthony and his assistants committed a crime in Canada, and there is probable cause to believe that the conduct would have been criminal if committed in the United States, then extradition is

appropriate. This is the "dual criminality" requirement. We focus on domestic law: "unless a plausible challenge is raised by the person sought, the authorities in the requested state will presume that the acts alleged constitute a crime under the law of the requesting state, and will consider whether the acts alleged constitute a crime under the law of the requested state." *Restatement (3d) of the Foreign Relations Law of the United States* s 476 comment d (1987); *see also In re Assarsson*, 635 F.2d 1237, 1244 (7th Cir.1980) (discussing the dangers of delving into foreign law). If the acts of the accused are considered criminal in both nations, extradition follows even if the requesting country does not have a criminal statute analogous to the one that makes the acts criminal in the United States. *Collins*, 259 U.S. at 312, 42 S.Ct. at 470-71; *Eain*, 641 F.2d at 508; *LoDuca*, 93 F.3d at 1111-12; *United States v. Levy*, 905 F.2d 326, 328 (10th Cir.1990). Acts are considered criminal "in this country" if they would be unlawful under federal statutes, the law of the state where the accused is found, or the law of the preponderance of the states. *Wright v. Henkel*, 190 U.S. 40, 61, 23 S.Ct. 781, 786, 47 L.Ed. 948 (1903); *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 918 & n. 4 (2d Cir.1981).

We very much doubt that Illinois would look with equanimity on someone who tried to remove a disabled person from the state to a foreign country, on the basis of an ex parte order issued by a foreign judge purporting to authorize acts within the territory of the United States--or for that matter on the basis of a guardianship proceeding from which U.S. citizens were automatically excluded. There is no international doctrine of full faith and credit ("comity" is some distance short of the legal obligation established by 28 U.S.C. s 1738), and the kind of orders involved here would not necessarily have been enforced even within the United

States. But we need not pursue the subject. One federal criminal statute is the only law we need discuss.

The federal kidnapping statute provides that:

> [w]hoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when--(1) the person is willfully transported in interstate or foreign commerce; ... shall be punished by imprisonment for any term of years or for life....

18 U.S.C. s 1201(a). Kidnapping under this statute has four elements: (1) transportation in interstate or foreign commerce, (2) of an unconsenting person who is (3) held for ransom, reward, or otherwise, accompanied by (4) a mental state of knowledge or willingness. *See United States v. Hernandez*, 106 F.3d 737, 738 n. 1 (7th Cir.1997) (noting slight variations among the circuits in expressing these elements); *United States v. Lewis*, 115 F.3d 1531 (11th Cir.1997); *United States v. Osborne*, 68 F.3d 94 (5th Cir.1995). The only issue contested in this case is whether Tammy was "an unconsenting person" within the meaning of s 1201(a). We must assume that Tammy did not agree to being removed from Winnipeg. Anthony nonetheless contends that because he is Tammy's guardian, he could consent on her behalf. Alternatively, petitioners submit that the guardianship conclusively establishes that Tammy is unable to exercise any will of her own, and therefore could not have refused to consent, any more than a minor child can block a parent's decision to move the family to another state or country.

Both variations of this line of argument run smack against a line of cases led by *Chatwin v. United States*, 326 U.S. 455, 66 S.Ct. 233, 90 L.Ed. 198 (1946), which holds that consent can be given (and liability under s 1201(a) therefore avoided) even when state law deems the person transported to be incapable of making an independent choice. *Chatwin* dealt with consent given; its approach is equally applicable to consent withheld. According to *Chatwin* and its successors, the federal court must decide whether the alleged victim was competent to exercise a rational will. *See United States v. Macklin*, 671 F.2d 60 (2d Cir.1982) (13 and 11 year olds capable of giving or withholding consent); *Eidson v. United States*, 272 F.2d 684 (10th Cir.1959) (11 year old; same conclusion). A guardianship order may show that a state judge believed that the ward lacks the mental capacity to give or refuse consent, but what a state judge believes is not conclusive in the federal prosecution.

The magistrate judge found that the evidence would permit a trier of fact to conclude that Tammy could exercise a rational will, and that she communicated a desire to remain in Winnipeg. If that is true, then Anthony's conduct, had it occurred in the United States, would have violated s 1201(a). *Chatwin* held that a 15-year-old girl with a mental age of 7 was sufficiently rational to give or withhold consent for purposes of s 1201(a). Evidence in the record could support a conclusion that Tammy possesses at least that much mental acuity, that she resisted Anthony when he took her from her home, and that she communicated intelligibly and rationally with U.S. customs officials when they asked her to choose between returning to Winnipeg or traveling with Anthony to Chicago. Petitioners will have an opportunity to make their arguments to the contrary at trial in Canada.

Anthony contends that, as Tammy's guardian, he was free to override her wishes. What else are guardians for? Can a father be brought to trial on a charge of kidnapping if he takes his child with the family from one state, or one country, to another? The answer to this question turns out to be murkier than the district court thought. *Polovchak v. Meese*, 774 F.2d 731 (7th Cir.1985), holds that parents who are citizens of another country cannot remove their own child from the United States to their native land, over the child's objection, unless the child first is afforded a hearing to determine whether living in another nation is in the child's interests. Walter Polovchak was only 12 when he balked at his parents' desire to return home, but we held that this was not conclusive.

Had Mr. and Mrs. Polovchak dragged Walter out of the United States, their act would not have been "kidnapping" because § 1201(a) does not criminalize the transportation of "a minor by a parent thereof". Originally the statute did not contain this exception but covered only abductions for "ransom or reward". It was amended in 1934 to include all involuntary interstate movement "for ransom or reward or otherwise"; the parental exception was part of this amendment. For a discussion of the history, *see United States v. Sheek*, 990 F.2d 150, 151-52 (4th Cir.1993). Congress did not add a similar exception for guardians of adult wards. Thus even though states may authorize guardians to ignore, within their borders, the wishes of a person adjudicated "disabled" or "incompetent," the national government requires a decision using a standard that looks at the actual mental abilities of a person being transported across state lines. Under the supremacy clause of the Constitution, the view of the federal government prevails to the extent these intra-state and inter-state rules conflict. A

guardian who moves an adult ward across state or national boundaries, against her will, therefore may be convicted of kidnapping.

Petitioners unsuccessfully argued before the magistrate judge that Manitoba lacks probable cause to believe that Canadian law had been violated. This argument has been abandoned. Because the dual-criminality argument is unsound, writs of habeas corpus should not have been issued.

REVERSED.

**Thomas KULEKOWSKIS, Anthony J. Lobue, Anthony DeSilva, Petitioners,**
**v.**
**Joseph G. DiLEONARDI, United States Marshall for the Northern District of Illinois, Respondent.**

**Nos. 95 C 3103, 95 C 3104.**

941 F. Supp. 741

United States District Court,
N.D. Illinois,
Eastern Division.

Oct. 7, 1996.

MEMORANDUM OPINION AND ORDER

LINDBERG, District Judge.

Petitioners Thomas Kulekowskis ("Kulekowskis"), Anthony J. Lobue ("Lobue"), and Anthony DeSilva ("DeSilva"), have brought before this court their petition for habeas corpus on appeal from a Certification of Extraditability issued by U.S. Magistrate Judge Edwin Bobrick. The Magistrate Judge entered the extradition order pursuant to an action filed by the U.S. Attorney, at the request of the government of Canada, seeking petitioners' extradition to Canada for allegedly kidnapping and transporting DeSilva's wife and ward, Tammy DeSilva, to the United States.

## STATEMENT OF FACTS

Anthony DeSilva and Tammy Lynn Wright ("Tammy") married in October 1986, and bought a home together in Winnipeg, Canada. In December 1987, DeSilva and Tammy were involved in a serious automobile accident in Monee, Illinois. Tammy survived, but sustained injuries to her spine and brain which left her a quadriplegic with permanent and extensive brain damage. In February 1988, DeSilva petitioned the Circuit Court of Cook County to bestow Tammy's guardianship upon him. Tammy's parents, Ernest and Christina Wright, were timely served with notice of the guardianship proceedings. Mr. Wright appeared by counsel at the proceedings to contest DeSilva's appointment. On March 24, 1988, despite Mr. Wright's objections, the court appointed DeSilva sole guardian of his wife's estate and person with no restrictions. In June 1988, in an effort to recover on Tammy's behalf, DeSilva filed a lawsuit against the trucking company involved in the accident.

Throughout 1988, DeSilva cared for Tammy at their Chicago area home. Mrs. Wright moved in with the couple to assist in her daughter's care. Despite devoting all his earnings, medical coverage, a disability payment from Tammy's Canadian automobile insurance carrier, and, eventually, even public aid to Tammy's care, the medical expenses soon exhausted DeSilva's financial resources. In January 1989, DeSilva, Tammy, and Mrs. Wright moved in with DeSilva's parents, Albert and Sally DeSilva, in Arizona. Mr. and Mrs. DeSilva spared no expense as they cared for Tammy, contributing upwards of $50,000.00 to her medical and living expenses. Realizing his parents' hardships, DeSilva decided to relocate to Canada. In July 1989, DeSilva moved Tammy to their home in Winnipeg where she was eligible for socialized

health care services. DeSilva granted Mrs. Wright permission to live in his home so long as she assisted in her daughter's care. Unable to find sufficient employment in Canada, DeSilva returned to the U.S. in search of work.

As part of DeSilva's lawsuit against the trucking company involved in the December 22, 1987, accident, it became necessary for Tammy to undergo a medical examination. On January 31, 1992, DeSilva's lawyer, Timothy J. Touhy, appeared before Judge James W. Kennedy of the Probate Division of the Circuit Court of Cook County seeking an order authorizing his client to bring Tammy to Chicago for a medical examination. Judge Kennedy told Mr. Touhy that DeSilva did not require official court authorization to bring Tammy to Chicago. Mr. Touhy explained that his client feared that Tammy's father, having previously demonstrated hostility towards DeSilva, might interfere with any efforts to move Tammy. In the interest of avoiding a possible dispute between DeSilva and the Wrights, Judge Kennedy entered an order authorizing DeSilva to bring Tammy back to Chicago for a medical evaluation, and enjoining third persons from interfering.

Despite Judge Kennedy's confidence in DeSilva's guardianship authority, the prospect of interference by Mr. Wright continued to concern Mr. Touhy and his partner, Mr. Engelland. They requested their friends, petitioners Kulekowskis and Lobue, to accompany DeSilva in order to deter Mr. Wright from acting out his threats of violence. As veteran Chicago police officers, Kulekowskis and Lobue thought it wise to contact the Winnipeg Police as a way of pre-empting any confusion or interference from local Canadian authorities.

The following day, February 1, 1992, Mr. Touhy contacted the Winnipeg Police Department and spoke to Duty Inspector Donald MacDiarmid. After explaining his client's plans to transport his wife and ward to Chicago, Mr. Touhy inquired whether he had to submit a copy of Judge Kennedy's order to the local Canadian authorities. Officer MacDiarmid informed Mr. Touhy that since no Canadian court order barred Tammy's removal, his client's intentions were not a police matter. Mr. Touhy conveyed this information to the petitioners.

Based upon his status as Tammy's guardian and the inquiries and representations of his attorney, DeSilva set out on February 3, 1992, for his home in Winnipeg in order to bring Tammy back to Chicago for a medical evaluation. DeSilva's father Albert, Mr. Kulekowskis, Mr. Lobue, and a registered nurse, accompanied him.

After a routine customs stop at the Canadian border the parties continued on their way, arriving at DeSilva's home in Winnipeg shortly after 6:30 a.m. Following a brief exchange of words with Mrs. Wright, during which DeSilva informed her that he had come to take Tammy back to Chicago for a medical examination and presented her with a copy of the court order authorizing him to do so, DeSilva and the nurse proceeded to peaceably move Tammy from her room to the car. While there is considerable disparity surrounding the details of Mrs. Wright's interaction with the parties during their brief time in the home, it is clear that Mrs. Wright did not acquiesce to her daughter's removal. After a failed attempt to contact her brother-in-law, Mrs. Wright telephoned the local police and told the operator that her daughter had been taken away by people who had a court order. The operator informed Mrs. Wright that local authorities did not consider

this a police matter in light of the court order authorizing the parties' conduct. Mrs. Wright then called her attorney, Robert Tapper, who in turn spoke with Staff Sergeant William VanderGraaf of the Winnipeg Police Department, shortly before 7:30 a.m. Mr. Tapper told Sergeant VanderGraaf that Tammy's husband had kidnapped her from her home in Winnipeg. Mr. Tapper did not inform Sergeant VanderGraaf of DeSilva's legal guardianship over Tammy. Sergeant VanderGraaf, in conjunction with members of the Royal Canadian Mounted Police (RCMP), and the Ontario Provincial Police, arranged for DeSilva and his companions to be stopped at the border on their way back to the United States.

When the petitioners arrived at the border at approximately 8:45 a.m. they were questioned by both U.S. customs officials and Canadian police. Despite DeSilva's being the sole person with legal authority to consent on Tammy's behalf, border officials questioned Tammy directly. Both before and after receiving the aid of her computer, Tammy indicated that she desired to be with her husband and, yet, remain in Winnipeg. The officers also questioned DeSilva, Kulekowskis, and Lobue. After recounting their story, and providing copies of DeSilva's guardianship papers and Judge Kennedy's order, the petitioners were released and told that they were free to go home. The parties agreed that since Tammy's parents had just obtained an emergency guardianship order from the Court of Queen's Bench in Winnipeg, it would be best to return Tammy to Winnipeg while the petitioners continued back to Chicago. The customs officers separated DeSilva and Tammy despite Tammy's repeated emotional requests for her husband to remain with her.

On February 4 and February 7, 1992, Canadian authorities interviewed Tammy at her and DeSilva's home in Winnipeg, apparently unconcerned that she had been declared incapable of making meaningful decisions. During these two interviews, authorities asked Tammy how she felt about charging five people with a criminal offense. Tammy nodded "yes" and indicated "do it" on the computer. She further indicated she was scared during the entire incident. Tammy's interviewers never disclosed to her the identity of the five people against whom they sought the criminal charges, nor the precise nature of the charges themselves. Tammy never submitted a statement, affidavit, or sworn testimony relating to this matter. Indeed, she is incapable of so doing. Despite this, however, Canadian authorities charged petitioners with kidnapping and forcible seizure of DeSilva's wife and ward. At Canada's request, the U.S. Attorney sought the extradition of all the participants. On March 28, 1995, the Magistrate Judge certified DeSilva, Kulekowskis, and Lobue, for extradition to Canada.

Faced with imminent removal to Canada, petitioner's brought before this court a writ of habeas corpus seeking relief from the outstanding extradition order. In support of their habeas petition, petitioners make the following claims: (1) the United States Extradition Statute 18 U.S.C. § 3184 is unconstitutional insofar as it violates the principle of separation of powers; (2) the Magistrate Judge's exercise of jurisdiction over extradition proceedings violates Article III of the Constitution; (3) the appearance of the U.S. Attorney in an extradition proceeding on Canada's behalf violates the Emoluments Clause of the Constitution; (4) there is insufficient evidence to support a finding of probable cause with respect to the requisite intent necessary to commit the offense of kidnapping; (5) petitioners suffered from

ineffective assistance of counsel; (6) the dual criminality element mandated by the Treaty of Extradition between the U.S. and Canada (the "Treaty") is lacking.

This court will grant petitioners' habeas relief since it finds that the dual criminality requirement of the Treaty has not been complied with. Since this finding is dispositive, the court need not address petitioners' other claims.

THE SCOPE OF THIS COURT'S HABEAS REVIEW

This court has jurisdiction to review the Magistrate Judge's decision on a writ of habeas corpus. 28 U.S.C. § 2241. The standard of review on a habeas corpus petition is de novo when the issues presented are questions of law or mixed questions of law and fact. *Quinn v. Robinson*, 783 F.2d 776, 791 (9th Cir.1986); *United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir.1984).

In the instant case, the determinative issue is whether or not the dual criminality requirement of the Treaty has been met. This question is purely a legal one. Article 2 of the Treaty as amended provides that: "Extradition shall be granted for conduct which constitutes an offense punishable by the laws of both Contracting Parties by imprisonment ... for a term exceeding one year or any greater punishment." Similarly, Article 10 of the Treaty provides in pertinent part that: "Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person would be found ... to justify his committal for trial if the offense of which he is accused had been committed in its territory ...[.]" These provisions constitute the dual criminality doctrine. The doctrine requires the court to make two findings: (1) whether petitioners' conduct violated Canadian

law, and (2) whether such conduct would have also violated Illinois or Federal law, had the crime been committed in Illinois. It is the second of these requirements, with respect to the petitioners' conduct in the present case, that this court finds lacking.

## ANALYSIS

In certifying their extradition, the Magistrate Judge held that the petitioners knowingly confined and transported Tammy from her home in Winnipeg, Canada, into the United States without lawful authority. *In re Extradition of Kulekowskis, et al.*, 881 F.Supp. 1126, 1149 (N.D.Ill.1995). In order to determine whether such conduct would violate Illinois law, The Magistrate Judge constructed a hypothetical in which the alleged misconduct transpired in Illinois. In constructing this hypothetical, all significant facts were "reversed." In the instant case, this resulted in a scenario in which a Canadian guardian removed his ward from the state of Illinois. After examining petitioners' conduct under this hypothetical reverse fact scenario, the Magistrate Judge determined that their conduct would have violated Illinois law--thus fulfilling the Treaty's dual criminality requirement.

The Magistrate Judge acknowledged that had all the relevant events occurred in Illinois, the petitioners' conduct would not be criminal: "[Petitioners] are correct that if they had taken Tammy from her home in Illinois ... they would not have committed a crime ...," thus, "... if Tammy had been living in Illinois he [DeSilva] could not be guilty of kidnapping or unlawful confinement in taking her to a medical examination ...[.]" *In re Extradition of Kulekowskis, et al.*, 881 F.Supp. at 1137. Under the reverse fact scenario, then, the pivotal issue becomes whether the petitioners would be

guilty of kidnapping had they attempted to remove Tammy from Illinois while acting under a valid Canadian guardianship order's protection.

The respondent and the Magistrate Judge construct a twofold argument in support of petitioners' guilt under the hypothetical dual criminality analysis: (1) petitioners would have failed to obtain recognition of DeSilva's Canadian guardianship by registering it in Illinois, and, (2) when faced with a Canadian guardianship, as a purported bar to criminal proceedings, an Illinois court would not automatically accord it full faith and credit. *Kulekowskis, et al.*, 881 F.Supp. at 1140.

With respect to the first point above, the respondent argues that absent some type of official recognition from an Illinois court, a Canadian guardianship would be void and would provide no protection to a guardian acting pursuant to its authority. Therefore, under the reverse fact scenario, had DeSilva sought to remove Tammy from Illinois, his actions would be criminal insofar as his Canadian guardianship order would not have been registered in Illinois.

The second aspect of the argument favoring the petitioners' guilt is made by the Magistrate Judge. Regardless of any registration requirement, the Magistrate Judge held that Illinois would not accord automatic full faith and credit to a Canadian guardianship decree. This holding stems from the Magistrate Judge's belief that decisions to defer to foreign judgments are entirely "discretionary determinations." *Kulekowskis, et al.*, 881 F.Supp. at 1140. This mere possibility that Illinois might not recognize a Canadian guardianship was sufficient, for the Magistrate Judge, to halt his inquiry into whether or not Illinois would in fact recognize

DeSilva's foreign guardianship. Without any further development of the dual criminality analysis, the Magistrate Judge decided that the possibility of "non- recognition" satisfied the dual criminality requirement.

In support of his holding that Illinois would not grant comity to DeSilva's Canadian guardianship order, The Magistrate Judge argued that comity determinations are entirely discretionary--even among sister-states of the Union. *Kulekowskis, et al.*, 881 F.Supp. at 1138-41. Furthermore, both he and the respondent cited cases in which Illinois did not recognize a foreign guardianship order. *Kulekowskis, et al.*, 881 F.Supp. at 1138-41.

**I. Illinois has no requirement that foreign orders be registered in order to be valid in Illinois.**

In determining whether petitioners are guilty of the crime of kidnapping under Federal or Illinois law, it is necessary to examine the allegedly criminal aspects of their conduct as though they had transpired in Illinois. Respondent argues that absent some type of official recognition from an Illinois court, a Canadian guardianship would be void and would provide no protection to a guardian acting pursuant to its authority. This is simply wrong. There is no law in Illinois, either statutory or judicially derived, which imposes such a registration requirement. Indeed, according to the Restatement (Third) of the Foreign Relations Law of the United States: "No procedures exist in the United States for registration of foreign country judgments, or for their validation by exequatur (i.e., an endorsement by order of a court authorizing execution)." *Restatement (Third) of the Foreign Relations Law of the United States* § 481 Pt. IV, cmt. g, (1986).

While it is true that some foreign guardianship orders are denied recognition when challenged, this is not evidence of an indiscriminate, statewide, presumption as to the invalidity of all foreign orders. Thus DeSilva, had he sought to remove Tammy from Chicago to Winnipeg, would not have had to register or seek recognition of his valid Canadian guardianship by an Illinois court prior to removing his ward from the state.

**II. The Magistrate Judge's dual criminality analysis is flawed.**

Since, under the hypothetical reverse fact scenario, Illinois would not require a Canadian guardian to pre-emptively register his guardianship in Illinois, the second issue in the analysis is whether Illinois would accord full faith and credit to a Canadian guardianship decree when presented with it as a defense to a criminal prosecution.

In his analysis of this issue, the Magistrate Judge held that Illinois would not accord automatic full faith and credit to a Canadian guardianship decree. Accordingly, he concluded that the dual criminality requirement of the Treaty had been met because a Canadian guardianship might not be recognized. The mere possibility that Illinois might not recognize a Canadian guardianship was sufficient, for the Magistrate Judge, to halt his inquiry into whether the dual criminality element was met. It is this premature curtailment of the analysis, however, which causes the Magistrate Judge's reasoning to be in error. Even though there is an element of discretion in the decision whether to grant comity to a foreign judgment, the Magistrate Judge did not complete the analysis. That a hypothetical order might be so deeply flawed that it would pose no barrier to a criminal conviction is obvious. What the Magistrate Judge should have done, but did not, is

determine whether a guardianship order like the one in the instant case would be granted full faith and credit, and would thus operate as a shield to conviction.

The Magistrate Judge's error stems from his belief that decisions to defer to foreign judgments are entirely "discretionary determinations." *Kulekowskis, et al.*, 881 F.Supp. at 1140. Such an interpretation of comity is fallacious insofar as it casts the decision of whether to accord recognition to a foreign judgment in an arbitrary and whimsical light. Furthermore, the Magistrate Judge erroneously concluded that: "Unless a foreign guardianship order would be an absolute bar to criminal proceedings, respondents conduct would be punishable under Illinois law ...[.]" *Kulekowskis, et al.*, 881 F.Supp. at 1140. This is wrong because foreign guardianship orders do not automatically bar criminal proceedings against their holders for the same reason that the decision whether to accord them deference as a matter of comity is not entirely arbitrary--recognition of their authority is conditioned on the application of a four-part test.[1] *Hilton v. Guyot*, 159 U.S. 113, 166-68, 16 S.Ct. 139, 144-45, 40 L.Ed. 95 (1895) (establishing the original four-part federal comity test).

**III. The Magistrate Judge mistakenly interpreted old Illinois law to argue that granting full faith and credit to guardianship decrees between sister- states is discretionary.**

In an effort to bolster his claim that Illinois would not accord full faith and credit to a Canadian guardianship order, the Magistrate Judge constructed an argument based on old

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[1] See discussion infra, § IV.

Illinois case law and inaccurate notions of comity. Looking to support his holding, that full faith and credit determinations among different countries are entirely discretionary, the Magistrate Judge argued that such determinations are entirely discretionary even among sister-states of the Union. After extensively quoting the Illinois Supreme Court's decision in *Noonan v. Wingate*, which in turn discusses a Massachusetts court's refusal to accord full faith and credit to an Illinois guardianship decree,[2] the Magistrate Judge concluded that: "The foregoing ... confirms our reading of Noonan as stating an unconditioned rule that comity never requires the recognition of a foreign guardianship over a child found within the state" (emphasis added). *Noonan v. Wingate*, 376 Ill. 244, 33 N.E.2d 467, 470-71 (1941); *Kulekowskis, et al.*, 881 F.Supp. at 1139. The Magistrate Judge's reasoning is dubious.

The Magistrate Judge's interpretation of Noonan is flawed in that he once more sounds an exaggerated note of discretionary decision making where none belongs. After adopting an overly liberal reading of comity's discretionary aspects, he then imputes such aspects to the practice of full faith and credit among sister-states. This is problematic. Such imputations are unsound because, unlike the granting of comity to foreign judgments, the granting of full faith and credit to judicial proceedings among sister-states is constitutionally mandated. US Const art IV, § 1, cl 1. As such, the extension of full faith and credit among sister-states is entirely devoid of discretionary or arbitrary decision making. The Appellate Court of Illinois made this clear when it stated in *Champion v. Champion* that, "... the constitutional obligation of this State to give full faith and credit to a decree

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[2] *Woodworth v. Spring*, 86 Mass. 321, 4 Allen 321 (1862).

of a sister state ... is an entirely different matter [than comity]." *Champion v. Champion*, 20 Ill.App.2d 271, 156 N.E.2d 16, 19 (1959). Additionally, in contrast to the four-part test governing the denial of recognition to foreign judgments, the extension of full faith and credit among sister-states may be withheld for only two reasons: "A judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter." *Nevada v. Hall*, 440 U.S. 410, 421, 99 S.Ct. 1182, 1188, 59 L.Ed.2d 416 (1979). The Court in Nevada even goes so far as to hold that, "... in certain limited situations, the courts of one State must apply the statutory law of another State." *Nevada*, 440 U.S. at 421, 99 S.Ct. at 1188. Thus, because the extension of full faith and credit among sister-states is a strictly regulated constitutional obligation, it is distinguishable from comity's international applications. The Magistrate Judge's imputation of the somewhat more flexible legal criteria of international comity to the legal relations among sister- states is therefore misguided.

**IV. While recognition of foreign judgments is not as strictly mandated as the practice of full faith and credit between sister-states, Illinois would still grant full faith and credit to a Canadian guardianship decree.**

Despite there being no rule of law requiring the recognition of foreign judgments, there is a strong presumption favoring the extension of comity to foreign decrees. *Brady v. Brown*, 51 F.3d 810, 816 (9th Cir.1995); *Philadelphia Gear Corporation v. Philadelphia Gear de Mexico*, 44 F.3d 187, 191 (3rd Cir.1994); *Remington Rand Corporation-Delaware v. Business Systems Inc.*, 830 F.2d 1260, 1266 (3rd Cir.1987).

> Comity is a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and the rights of persons protected by its own laws [as opposed to those of other nations].

*Clubb v. Clubb*, 402 Ill. 390, 84 N.E.2d 366, 371 (1949). While not as strictly regulated as the practice of full faith and credit among sister- states, the decision whether to extend comity to foreign judgments clearly rests on more than an arbitrary desire to courteously accommodate another nation's judicial requests.

In *Brady v. Brown*, the court held that under the doctrine of comity "... 'the forum state will generally apply the substantive law of a foreign sovereign to causes of action which arise there'." *Brady*, 51 F.3d at 816. Likewise, the Restatement (Third) of the Foreign Relations Law of the United States reads: "A foreign judgment is generally entitled to recognition by courts in the United States ...[.]" *Restatement (Third) of the Foreign Relations Law of the United States* § 481 Pt IV, cmt c, (1986). Furthermore, the lofty standards which courts must meet in support of a decision not to grant comity to a foreign order are meant to encourage the recognition of foreign judgments. *Remington Rand*, 830 F.2d at 1266; *Universal Minerals v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3rd Cir.1981). In *Remington Rand*, the court held that: "Findings of fact underlying a decision to extend comity, however, are governed by the

clearly erroneous standard" (emphasis added). *Remington Rand*, 830 F.2d at 1266.

The extension of recognition to a foreign country's judgment is contingent upon the establishment of a prima facia case that the judgment is entitled to recognition. *Hilton*, 159 U.S. at 166-68, 16 S.Ct. at 144-45. The four criteria which the Supreme Court set out for the recognition of a foreign judgment in Hilton are still followed today. *Ma v. Continental Bank N.A.*, 905 F.2d 1073, 1075 (7th Cir.1990); *In re Marriage of Lanae Silvestri-Gagliardoni*, 186 Ill.App.3d 46, 134 Ill.Dec. 106, 108, 542 N.E.2d 106, 108 (1989); *Hunt v. BP Exploration Co. Ltd.*, 492 F.Supp. 885, 894 (N.D.Tex.1980);

> "The elements required to establish a prima facia case of entitlement of recognition of a foreign country judgment are that the rendering court had jurisdiction over the person and subject matter; there was timely notice and an opportunity to present the defense; no fraud was involved; and the proceedings were according to a civilized jurisprudence."

*Silvestri-Gagliardoni*, 186 Ill.App.3d at 51, 134 Ill.Dec. at 110, 542 N.E.2d at 110. Considering the case at bar in light of these four requirements, it is apparent that had DeSilva's hypothetical Canadian guardianship over Tammy been obtained in the same manner and under the same conditions as his actual Illinois guardianship was--it would be recognized in Illinois. First, there clearly would be personal and subject matter jurisdiction since DeSilva and Tammy resided in the forum state. Second, the Wright's had notice and opportunity to present a defense. Mr. Wright appeared at the guardianship hearing through counsel while Mrs. Wright, after being served with notice of the proceedings, consulted with Tammy's ad

litem appointed guardian who represented her at the hearing. Third, no suggestions of fraud have been advanced. Fourth, there is no doubt that a proceeding identical to the Illinois hearing would qualify as being conducted in accordance with civilized jurisprudence. Consequently, under the principles of comity, an Illinois court would have been required to recognize the Canadian custody order, had DeSilva's guardianship appointment been done in Canada.

Illinois' propensity to grant recognition to a foreign judgment is also indicated by its adoption of the Uniform Child Custody Jurisdiction Act ("UCCJA"), Ill.Rev.Stat.1987, ch 40, pars 2101-2126, and the Uniform Foreign-Money Claims Act ("UFMCA"), 735 ILCS 5/12-630, both of which facilitate and encourage the recognition and enforcement of foreign judgments in Illinois.

The Illinois Appellate Court recognized the validity of a foreign judgment when it upheld an Italian child custody order, after applying both the Supreme Court's standards and those of the UCCJA. *Silvestri-Gagliardoni*, 186 Ill.App.3d at 49, 134 Ill.Dec. at 109, 542 N.E.2d at 109. In *Silvestri-Gagliardoni*, a husband and wife obtained a divorce in Italy and the Italian court entered a separation and custody judgment. The proceedings met the requirements of proper jurisdiction, notice, lack of fraud, and civilized jurisprudence. Subsequently, the wife filed a petition for dissolution in an Illinois court seeking to re-litigate issues formerly decided by the prior Italian judgment. *Silvestri-Gagliardoni*, 186 Ill.App.3d at 47, 134 Ill.Dec. at 108, 542 N.E.2d at 108. The trial court dismissed the wife's petition for dissolution and the Illinois Appellate Court affirmed the dismissal, citing the UCCJA's foreign judgment recognition requirements:

> Since the case at bar involves the custody decree of a foreign nation, the provisions of the UCCJA became operational to determine whether the trial court had jurisdiction.... The provisions of this Act relating to the recognition and enforcement of custody judgments of other states apply to custody judgments and judgments involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons. Thus, the provisions of the UCCJA extend to foreign custody judgments.

*Silvestri-Gagliardoni*, 186 Ill.App.3d at 49, 134 Ill.Dec. at 109, 542 N.E.2d at 109. Both the Illinois Circuit and Appellate Courts found that the trial court lacked jurisdiction to consider the matter since its issues had been disposed of in a prior Italian decree. "... [T]he UCCJA operated in this case to deprive the Illinois court of jurisdiction by operation of the prior Italian decree. It is our opinion that the UCCJA compels Illinois courts not only to recognize proper custody decrees from foreign nations, but also that they must decline to accept jurisdiction to modify custody decrees ... [.]" *Silvestri-Gagliardoni*, 186 Ill.App.3d at 149, 134 Ill.Dec. at 109, 542 N.E.2d at 109.

While Illinois courts are likely to grant comity to a foreign judgment in general, they are especially apt to recognize the rights of a foreign guardian where the ward is in Illinois pursuant to an agreement between the parties. *In re Guardianship of Arnold*, 114 Ill.App.2d 68, 252 N.E.2d 398, 400 (1969). In *Arnold* the trial court recognized an Ohio decree granting a father custody over his child and refused to impart guardianship to the mother while the child visited her in Illinois in accordance with the parents' visitation agreement.

*Arnold*, 114 Ill.App.2d 68, 252 N.E.2d at 400. On appeal, the court did "... not find therein a basis to hold [that] the trial court abused its discretion in refusing to exercise jurisdiction over the mother's request. *Arnold*, 114 Ill.App.2d 68, 252 N.E.2d at 400.

The element of agreement between the parties, as in *Arnold*, is also present in the case at bar. Like the parents' visitation agreement in *Arnold*, DeSilva and Mrs. Wright agreed that Tammy should remain in DeSilva's Winnipeg home provided that Mrs. Wright promised to care for her. Thus, as it refused to trample on the father's Ohio guardianship decree in *Arnold*, Illinois would honor a Canadian guardianship order granting DeSilva the right to remove Tammy from Illinois after being left here pursuant to an agreement between himself and Mrs. Wright.

**V. Examples of cases where a foreign guardianship decree has not been recognized are distinguishable on two grounds.**

Both the Magistrate Judge and the respondent cite case law in support of the proposition that Illinois does not give automatic recognition to foreign guardianship orders. Both, however, overlook the significant aspects which distinguish their cases from the one at hand.

The cases of *Republic of Iraq v. First National Bank of Chicago*, and *Noonan v. Wingate* are cited by the Magistrate Judge and respondent as examples of occurrences when Illinois refused to grant recognition to a foreign guardianship decree. Reliance on these cases is misplaced because, in both instances, the original guardianship order was somehow flawed. *Republic of Iraq v. First National Bank of Chicago*,

350 F.2d 645, 649 (7th Cir.1965); *Noonan*, 376 Ill. 244, 33 N.E.2d at 469. In *Republic of Iraq*, Illinois refused to recognize an Iraqi guardianship decree because, among other reasons, the Iraqi decree lacked the elementary components of personal and subject matter jurisdiction over the parties. *Republic of Iraq*, 350 F.2d at 649. Consequently, since it could not meet the necessary threshold criteria to invoke the doctrine of comity, the Iraqi guardianship order did not receive recognition in Illinois. Similarly, in *Noonan*, the Illinois court refused to recognize a Massachusetts guardianship decree under either full faith and credit or comity. The court held that the Massachusetts court lacked personal jurisdiction over the minor in question, to say nothing about its failure to give notice and an opportunity to be heard to the child's custodians in Illinois. *Noonan*, 376 Ill. 244, 33 N.E.2d at 469.

In contrast to *Republic of Iraq* and *Noonan*, the facts of the present case involve a situation where the Illinois court did have personal and subject matter jurisdiction over the parties, and proper notice had been effectuated. The propriety of DeSilva's Illinois guardianship decree over Tammy is incontrovertible. Accordingly, under the reverse fact scenario, it must be assumed that had DeSilva been awarded guardianship of Tammy by a Canadian court, the hypothetical Canadian order would be as valid as the actual Illinois order. DeSilva's Canadian guardianship would, therefore, be a bar to successful prosecutions.

The second element which distinguishes the cases cited by the Magistrate Judge and respondent, in support of their claim that Illinois does not grant automatic recognition to foreign judgments, is the presence of competing custody claims. In both *Woodworth v. Spring*, and again in *Republic*

*of Iraq*, the court questioned the validity of the respective guardianship orders in light of a competing custody claim. *Republic of Iraq*, 350 F.2d at 649; *Spring v. Woodworth*, 84 Mass. 206, 2 Allen 206, 207 (1862). In *Woodworth*, the Massachusetts court refused to recognize an Illinois guardianship order because of a second valid guardianship claim in Massachusetts. The conflicting guardianship orders required the court to recognize the earlier of the two claims, and so the Illinois claim did not receive recognition due to its later issue. *Woodworth*, 2 Allen at 207. Similarly, in *Republic of Iraq*, an Illinois court refused to recognize an Iraqi guardianship order because of a second competing Illinois guardianship claim. The court elected to recognize the Illinois guardianship claim, even though it did not precede the Iraqi claim, because the Iraqi guardianship decree failed to meet comity's jurisdictional requirements. *Republic of Iraq*, 350 F.2d at 649.

Unlike the guardianship orders in *Woodworth* and *Republic of Iraq*, DeSilva's guardianship decree stands alone--unchallenged by a second competing order, and in compliance with the requirements of comity. The Magistrate Judge's observation that Republic of Iraq and Woodworth stand for the proposition that Illinois will not automatically recognize all foreign guardianship orders is correct, but only tells half the tale. Neither respondents nor the Magistrate Judge were able to point to a case in which a valid guardianship decree, in the absence of a competing claim, was denied recognition.

## CONCLUSION

In determining whether to extradite the petitioners to Canada on charges of kidnapping, it is necessary to examine

their conduct under the reverse fact scenario required by the dual criminality element of the U.S.-Canada extradition treaty. Under this reverse fact scenario, Illinois would be unable to successfully prosecute the petitioners for kidnapping because it would not require DeSilva to register his Canadian guardianship. Illinois would recognize a valid Canadian guardianship and so a Canadian guardian--like an Illinois guardian--would be incapable of kidnapping his ward from Illinois. Thus, since the guardians' conduct would not be criminal in Illinois, the dual criminality requirement of the Treaty is not met.

ORDERED: Petitioners' motion for habeas corpus relief from an order of extraditability is granted. The Magistrate Judge's finding of extraditability is overruled on grounds that the petitioners' conduct failed to meet the dual criminality requirement of the U.S.-Canada extradition treaty.

**In the Matter of the EXTRADITION OF Thomas KULEKOWSKIS, Anthony J. Lobue, Anthony De Silva, Albert De Silva and Judith Dawn Schon.**

881 F. Supp. 1126

**No. 94 M 75.**

United States District Court,
N.D. Illinois,
Eastern Division.

March 28, 1995.

ORDER AND CERTIFICATION OF EXTRADITABILITY

BOBRICK, United States Magistrate Judge.

Before the court are the COMPLAINT FOR EXTRADITION (18 U.S.C. § 3184) filed by the United States' Attorney for the Northern District of Illinois on behalf of the Government of Canada seeking the extradition of respondents Thomas Kulekowskis, Anthony J. LoBue, Anthony DeSilva ("Anthony"), Albert DeSilva and Judith Schon, and RESPONDENTS' MOTION TO DISMISS THE COMPLAINT FOR EXTRADITION. The Canadian government accused respondents of kidnapping Tammy Lynn Wright ("Tammy"), Anthony's wife, from her home in Winnipeg, Manitoba, Canada, on February 3, 1992. The respondents have been released on bail pending a ruling on the petition.

As will be discussed in detail below, extradition requires only that the extraditing country show that the person before the court is the accused person, that the offense with which the accused is charged is an extraditable offense under the applicable treaty, and that there is probable cause to believe the accused committed the offense.

The respondents do not deny that they are the persons sought in the Canadian government's request for extradition, nor do they deny removing Tammy from her home and bringing her from Canada into the United States. They contend that because Anthony was Tammy's legal guardian their conduct was either lawful or not extraditable; alternatively, they argue that their reasonable belief that they had legal authority to transport Tammy should bar extradition.

On May 27, 1994, a hearing was held before the undersigned, at which the parties argued their positions. Neither party sought to introduce witness testimony, although respondents' expert on international law and foreign relations, Patrick M. McFadden, was questioned concerning his affidavit. Instead, the parties introduced into evidence extensive exhibits consisting of affidavits, transcripts of court proceedings, transcripts of telephone calls, court orders, copies of treaties, and other relevant documents.[1]

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[1] The government's exhibits are offered in three collections captioned "Exhibits in Support of Complaint for Extradition," cited as Pet. Exh. __; "Supplemental Exhibits Submitted on Behalf of the Government of Canada," cited as Pet. Supp. Exh. __; and "Final Supplemental Exhibits Submitted on Behalf of the Government of Canada," cited as Pet. Final Supp. Exh. __. Respondents' exhibits are offered under the title "List of Respondents' Exhibits," and are cited as Resp. Exh. __.

On August 15, 1994, the record was closed to the introduction of further evidence. All parties filed extensive post-hearing briefs, and the Fraternal Order of Police also filed a brief amicus curiae. The matter is ready for decision. Jurisdiction of the Magistrate Judge over the subject matter of this case and the persons of the defendants is not contested.

## I. FACTS

The evidence before the court yields the following account. Tammy and Anthony were married in 1986. In December 1987, they were involved in an automobile accident that left Tammy a quadriplegic with serious and considerable brain damage. Anthony was appointed guardian of Tammy's estate and person by order of the Circuit Court of Cook County, Illinois dated May 24, 1988. (Resp.Exh. 13).

At the time of the alleged kidnapping, Tammy was no longer living with Anthony, but had been living in Winnipeg with her mother, Christina Wright. According to Anthony, she was living with her mother rather than with him because caring for Tammy had exhausted his financial resources. In the summer of 1989, Tammy and her mother went to live in a house in Winnipeg, owned jointly by Anthony and Tammy. They did so to take advantage of the fact that, as a Canadian citizen, Tammy would be eligible for government-provided health care in Canada. (Affidavit of Anthony DeSilva, Resp.Exh. 33.)

It was in June 1988, that Anthony, on his own behalf and as Tammy's guardian, filed a personal injury lawsuit in the Circuit Court of Cook County, in Chicago, against the driver and owner of the other vehicle involved in the accident that crippled Tammy. By reason of this lawsuit it became

necessary for Tammy to undergo a medical examination as part of discovery proceedings in that suit.

On January 31, 1992, Anthony's lawyer, Timothy J. Touhy, appeared before Judge James W. Kennedy of the Probate Division of the Circuit Court of Cook County seeking an order authorizing Anthony to bring Tammy to Chicago for examination. It appears from Touhy's colloquy with the court that Anthony was afraid that Tammy's parents would be named her guardians in a Canadian proceeding and that Anthony would thus lose control of her care. Anthony was fearful that Tammy's father, Ernest Wright, would misuse and misappropriate the monies to which Tammy was entitled for her injury and care. (Pet.Supp.Exh. 1, pp. 4, 6; Resp.Exhs. 29 and 33). If he were appointed guardian of Tammy, Anthony intended to bring Tammy back to Chicago to live and Tammy would live on $20,000 in the guardianship account until settlement of the litigation provided a source of money for her care. (Transcript of Proceedings of January 31, 1992, Pet.Supp.Exh. 1).

Judge Kennedy pointed out to Mr. Touhy that Anthony did not need an order to bring Tammy to Chicago, but Touhy asked him to enter an order anyway "just in case he [Anthony] is stopped." *Id.* Commenting that there was "not too much I can do, if anything, in Canada," *Id.* Judge Kennedy entered an order authorizing Anthony "to take custody of the person of Tammy DeSilva, wherever she may be found, for the purpose of presenting her to a physician or medical care provider for evaluation, treatment or assessment," and enjoining third persons from interfering. (Resp.Exh. 20).

The following day, February 1, 1992, an anonymous caller telephoned the 911 emergency telephone line in Winnipeg. The telephone conversation was recorded and

transcribed. (Pet.Supp.Exh. 3).[2] The caller identified himself as an American lawyer who wanted to ask about procedures to be followed in bringing the Canadian wife of an American citizen to the United States for treatment.[3] Although he first stated that the woman was in a coma, the caller later corrected himself and said that she was brain-damaged and could not communicate. He said the husband was the wife's guardian, and that he had a court order permitting him to take her to the United States for treatment. He wanted to know whether he had to submit a copy of the order to the local police or what formalities were required.

The 911 operator connected the caller with Duty Inspector Donald MacDiarmid of the Winnipeg Police, and the caller explained his situation as follows:

> We're trying to make arrangements for him to come up with the Court Order and with the uh the people. I mean the medical personnel who are going to transport her and I talked to the airlines and I'm trying to make arrangements with them to do that. But I know in our Country what we have to do, it's what we call an Order of Protection, where we have an order uh giving him authority to remove her wherever she's found and prevent anyone else from interfering with her.... When we have to do that in the

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[2] The summary at the front of the Supplement Exhibits identifies Exhibit 3 as transcripts of two telephone calls placed February 3, 1992 to the "911 operator in Winnipeg. However, the second transcript is dated February 1, 1992 and must have preceded the first, which is dated February 3 and was a response to Tammy's abduction.

[3] Because Touhy has stated that he contacted the Winnipeg police, (Resp. Exh. 35 at 2), we assume he was the caller, although it is possible that the caller was another attorney, E. Engelland. See note 6.

> United States we have to file a copy with the local Police Department. So that they're put on notice of the Order.

(Pet.Supp.Exh. 3 at 5). He then asked whether MacDiarmid "considered that to be a police matter." MacDiarmid responded that it would only be a police matter "if you expected resistance from her to be moved." The caller stated that the woman would not be in a position to offer resistance, but that family members might interfere, explaining that this was why they had obtained a court order. *Id.* He did not say what court had issued the order. MacDiarmid said that as the husband and as a Canadian citizen he'd be entitled to move her anywhere that he choice [sic] and only at such time as other family members opposed it, they would have to get a Court Order to stop it. In other words I would think the onus would then fall on them. He doesn't have to produce anything. That's his wife. *Id.* at 6. The caller then pressed him, asking what would happen if the mother asked the police to arrest the husband for taking her daughter. MacDiarmid indicated that he thought the mother would not have the right to block it. *Id.* at 7. There then appears to be some confusion, as MacDiarmid stated that the only way the police could determine whether there was a court order in Canada would be to ask the Court of Queen's Bench. The caller assured him that "there's nothing pending up there," then asked him hypothetically whether, if someone were to call and say that "so and so is moving my daughter or my sister and so and so is the husband, would you consider that to be a Police matter?" MacDiarmid said that he would not. *Id.*

Showing some anxiety and uncertainty, the caller continued the conversation, explaining that he was going "through all this preliminary rigmarole" to avoid any delay in transporting the woman. MacDiarmid asked to whom the caller had spoken, and the caller told him he had spoken to

"the Consulate," who referred him to "the R.C.M.P. [Royal Canadian Mounted Police]" who had referred him to the Winnipeg police, adding that "apparently no lawyer can give me any advice on this." *Id.* at 8. MacDiarmid, perhaps now realizing that the matter might be more complicated than he had thought, said that "we [the police] would go to what we call our Crown Attorney's Office and we would speak with the Senior Crown attorney who is Bruce Miller and he would be able to give us advice on where we stand on that regard." *Id.* at 8-9. MacDiarmid then repeated his understanding that if what was proposed were to be done the police would not become involved "unless the family went to Court and obtained a Court order." *Id.* at 9.

The caller then asked MacDiarmid's name, and asked if he would be the duty inspector on Monday. MacDiarmid said that he would be on duty starting at 4:30 and gave the name of the officer who would be on duty before then. MacDiarmid then gave him Bruce Miller's telephone number so that he could obtain further advice. *Id.* at 10. The caller then said "well it certainly can't be a Police matter 'cause a man can't kidnap his own wife uh," to which MacDiarmid responded, "no." *Id.* at 11. MacDiarmid then attempted to transfer the call to Miller's office. As he did so, the recorder picked up the following conversation:

> He's the Duty Inspector and he's identified the other Duty Inspector and he's gonna get me the Crown Attorney, who can give us, who's gotta be like the uh Government Lawyer up there. Who he (inaudible). He's never heard of this and he says there's noth-no reason he can think that they'd try to stop it. Hi Judy. Judy this is Tony (inaudible). Judy's a nurse (laughs). Who we may have to press into service in this one (laughing).

*Id.* There is no evidence that the caller telephoned Miller prior to the alleged kidnapping.

On February 3, 1992, between two and four a.m., two cars approached the Canadian border and their occupants were interrogated by Canadian Customs Officer Terry Kreitz as to their business in Canada. The first car contained two men. The passenger gave his name as "DeSilva" and said they were traveling to Winnipeg to give his wife a surprise wedding anniversary party, and that they would be staying one or two days. The driver said he was DeSilva's boss, and said that the vehicle behind them contained friends of the DeSilva's going to the same event. The second car had three occupants, two men and a woman. The men said they were Chicago police officers and showed police identification. They also said they were going to a party for the DeSilvas. Kreitz let them pass. (Pet.Final Supp.Exh. 2).

At about 6:40 a.m. that day Christina Wright responded to a pounding on her side door. When she answered the door she saw Anthony, his father Albert DeSilva, and two men and a woman she had never seen before. She learned later (she does not say how) that the men were Chicago police officers, and stated that the woman was identified as a nurse according to Mrs. Wright the group then barged into her home. The men said they had a court order to take Tammy to be examined by a Dr. West at a 7:15 a.m. appointment at the Mall Clinic in Winnipeg. Anthony and the woman went to Tammy's bedroom. The woman put Tammy's hand splints and shoes in her purse and Anthony rummaged

through her drawers and closets. Mrs. Wright observed that Tammy looked scared, surprised and shocked, and was crying and kicking. (Affidavit of Christine Wright, Pet.Exh. 15).[4]

Mrs. Wright returned to the kitchen area where Albert DeSilva, Kulekowskis and Lo Bue were waiting. She tried to phone for help, first trying to call her brother-in-law, then her attorney. Both times the men disconnected the telephone from the wall so that she could not complete the call.[5] One of the men also took her list of telephone numbers.

Mrs. Wright saw Anthony carry Tammy from her bedroom and out the door wearing only her pajamas and a bathrobe. He placed her in a white car and all of the visitors drove away. After they were gone, she telephoned 911 for help. At no time did Anthony tell her that he planned to take

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[4] In affidavits both Anthony and the nurse, Judith Schon, denied that Tammy was upset or kicking or crying; in fact, Schon doubted that Tammy had the ability to kick, and testified that she never heard Tammy utter any sound of any kind. (Supp. Aff. of Judith Schon at ¶ 1; Supplemental Aff. of Anthony DeSilva at 4). (Crying may mean shedding tears, not crying out). Kulekowskis and Lobe argue in their brief at 18 n. 1 that since Tammy is a quadriplegic, it was impossible for her to kick. While we may not weigh the credibility of witnesses, it may be permissible to disregard testimony shown to be contrary to the laws of nature. *See Zollman v. Symington Wayne Corp.*, 438 F.2d 28, 32 (7th Cir.1971); *American Pfauter, Ltd. v. Freeman Decorating Co.*, 796 F.Supp. 347, 347 (N.D.Ill.1992) (incredible evidence will not defeat summary judgment.) However, the respondents have not proven that Tammy was physically incapable of acting as Mrs. Wright described. It appears that Tammy is a spastic quadriplegic whose limbs are not under control but capable of movement.

[5] Mrs. Wright did not explain how she managed to reconnect the telephone between attempts.

Tammy, nor did Anthony ever ask Tammy if she were willing to go with him. *Id.*

The Winnipeg police received Mrs. Wright's call to 911 at approximately 7:00 a.m. The call was recorded and transcribed as Pet.Supp.Exh. 3. She was evidently very anxious and upset. The 911 operator gave her the telephone number of the district police station. *Id.* Perhaps because the police did not appear to be acting, or acting quickly enough, she also called her lawyer, Robert Tapper, who then spoke with Staff Sergeant William VanderGraaf of the Winnipeg Police Department shortly before 7:30 a.m. Tapper told him that Anthony and Tammy were legally separated and that Tammy is a quadriplegic. (Affidavit of William VanderGraaf, Pet.Exh. 10 at 2). He apparently did not say that Anthony was Tammy's legal guardian.

A plainclothes constable, R. de Groot, was dispatched to Mrs. Wright's home, arriving about 8:05 a.m. De Groot informed VanderGraaf, in addition to the facts set forth above, that Mrs. Wright told him that Anthony had said that he had the legal right to take Tammy and had briefly shown her a legal document from a United States court, but that she had not been able to read it. She said that Tammy had been living with her in Winnipeg since July 1989, and that there had been no communication between Tammy and Anthony since Christmas of 1990. Mrs. Wright believed that Anthony was taking Tammy back to the United States because there was litigation pending concerning the accident involving millions of dollars. *Id.* at 3. Although VanderGraaf stated that "I am further informed that Anthony De Silva obtained guardianship of his wife as a result of a Cook County Court decision;" he does not say that he knew at the time that Anthony was Tammy's guardian.

According to VanderGraaf, the R.C.M.P. and Ontario Provincial Police were alerted shortly before 8:30 a.m. Vandergraaf had learned, whether through Tepper or Mrs. Wright, that Tammy could use a computer keyboard device to communicate. Two other Winnipeg police officers, Sergeants Roland Oliver and Robert Marshall, went to the house and took the keyboard, which the respondents had not taken with them, and headed for Emerson, Manitoba and then to the American border crossing station at Pembina, North Dakota, arriving there at 10:05 a.m. *Id.* at 4-5.

There they found the respondents and Tammy, who had been stopped by U.S. Customs agents at about 8:45 a.m. in response to a notice from the Winnipeg police that a female quadriplegic who was unable to speak had been abducted by her estranged husband and four other individuals. (Investigative Report of U.S. Customs Special Agent Michael H. Mach, Pet.Exh. 11 at 2). Tammy's abductors were identified as the respondents named in this petition. Sergeant C.N. MacKINNON, the officer in charge of the Emerson Department of the R.C.M.P. then arrived, and was permitted to observe as Vera Layhon, United States Customs Supervisor, questioned Tammy. Not having her keyboard, Tammy responded by nodding or shaking her head to signify "yes" or "no." She indicated that she understood Layhon was a U.S. Customs officer, that she was afraid, that she had not been given drugs or medication, she was being taken against her will, and that she wanted to go back to Canada. MacKINNON believed she understood what was being said to her. (C.N. MacKINNON Letter dated February 2, 1992, Pet.Final Supp.Exh. 1) (VanderGraaf Aff. at 7).

When Marshall and Oliver arrived with Tammy's keyboard device, better communication became possible. At about 11:15 a.m. U.S. Customs Special Agents Michael H.

Mach and Anthony L. Onstad arrived. Mach questioned Tammy using the keyboard and elicited the following responses:

> Agents: Is there anything you would like to say before we begin asking you questions? We would like to know what your feelings are about this situation.
> Tammy: Where did you get this machine?
> Agents: The Winnipeg police brought it here from your mother's place. What do you want Tammy? What would you like to say?
> Tammy: I want to go home with Anthony if it is o.k.
> Agents: Where is home Tammy?
> Tammy: Winnipeg.
> Agents: Do you want to go home with Anthony to Chicago?
> Tammy: I want to go home.
> Agents: Do you want to go to Chicago?
> Tammy: No.
> Agents: Why don't you want to go to Chicago?
> Tammy: Because it is not home.
> Agents: Do you want to be with Anthony or you mom?
> Tammy: My mom.
> Agents: How long have you been in Canada since the accident happened?
> Tammy: One year.
> Agents: What did Anthony tell you this morning about where he was taking you?
> Tammy: For a ride, did not say where.

(Mach Investigative Report, Pet.Exh. 11 at 2-4).

The customs agents noted that the respondents had not brought along any clothes or luggage for Tammy. *Id.* at 4. The agents interviewed Anthony, who told them that he had

flown into Fargo, North Dakota the previous evening where his father, Albert DeSilva, had rented a Cutlass Cierra and Kulekowskis had rented a Cadillac DeVille. They had driven to Winnipeg, arriving early in the morning. He stated that he had not known the two off-duty police officers, Kulekowskis and LoBue, or Schon, the nurse, before the trip. He said he brought Kulekowskis and LoBue along because he was afraid that Tammy's father, Ernest Wright, would attempt to prevent him from taking Tammy with him. According to Anthony, Ernest Wright had deserted the family when Tammy was young, and was only interested in getting his hands on the proceeds of the lawsuit.

Anthony told them that Tammy is unable to communicate or understand what is happening to her. She could not think rationally; she didn't care about the "six million dollar lawsuit" and only wanted to be home with her mother and forget what happened to her in Chicago. At that time the officers told Anthony that they had interviewed Tammy, and that her skills were good and that she understood what was happening to her. *Id.* at 6.

When the officers interviewed LoBue and Kulekowskis, they told them that they thought they were doing a favor for a lawyer in Chicago and that everything was legitimate. According to Mach, the two said the lawyer was "Tim Touhy"; according to Onstad, the lawyer's name was an "Art England."[6] They said they were not acting as policemen

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[6] Attorney Arthur E. Engelland also represents Anthony in the automobile accident suit and later spoke to Canadian Crown Attorney Bruce Miller on behalf of the respondents. (Affidavit of Arthur E. Engelland, Resp. Exh. 34). He does not state in his affidavit that he participated in a telephone inquiry to the Winnipeg police, so we infer that the attorney was Touhy, who acknowledges doing so. On the other hand, according to the report of Special Agent Onstad, LoBue stated that he and Kulekowskis were doing a

and they were not being paid, but would be reimbursed for the vehicle rental and their airline tickets had been purchased by the lawyer. Before they left Chicago they had been in the lawyer's office when he spoke on the telephone to an Inspector "McDermott" who had advised the lawyer that this was not a police matter but a civil matter. (Mach Investigative Report, Pet.Exh. 11 at 4-6; Onstad Investigative Report, Pet. Exh. 12 at 4-6).

Meanwhile, Tapper, the Wrights' attorney, had filed an emergency petition with the Court of Queen's Bench in Winnipeg and obtained an interim order naming the Wrights as Tammy's guardians. (Resp.Exh. 21).[7] The assembled offices at Pembina were apparently notified of this, since Mach's report states that an AUSA (Assistant U.S. Attorney) Crooks advised the agents to allow Tammy to return to Canada pursuant to a Canadian Court order issued on February 3, 1992. (Mach Investigative Report at 7). Tammy returned home in an ambulance, but only after repeatedly asking Anthony to come with her. Anthony refused, saying that he would be arrested if he went back to Canada, and asked Tammy to come with him to Chicago, saying that after

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favor for a lawyer identified as "Art England" and that "England" called later to ask what the problem was, saying he had spoken to an inspector from the Winnipeg Police Department. (Pet. Exh. 12 at 3, 6). We take judicial notice that Touhy and Engelland are listed in the 1992 Sullivan's Law Directory of Illinois attorneys as having their offices in the same building and suite. We do not know what their relationship may be.

[7] It appears that an application had been pending in the Winnipeg court to have the Wrights named as committees of Tammy's estate. VanderGraaf stated that a Winnipeg lawyer, William Molloy, told him that he had been retained by Touhy the previous December to represent Anthony in contesting the application. However, Molloy told VanderGraaf that he had not spoken with Touhy between January 29 and February 3, the date of the kidnapping, nor thereafter. (VanderGraaf Aff. at 7).

she appeared before the court he would bring her back to Winnipeg. Tammy said she did not want to go to Chicago, and again asked Anthony to return with her to Winnipeg. Eventually Anthony left the Pembina port of entry at 1:45 p.m. and at 2:00 p.m. Tammy left Pembina for Winnipeg. (Onstad Investigative Report, at 7).

The following day, February 4, 1992, Sergeant Marshall again visited Tammy at her home in Winnipeg. He asked her "how she felt" about the five people being charged with a criminal offense She nodded "yes" and then typed out "Do it." He then asked her "if she needed further explanations." Her typed response was "I understand." On February 7, 1992, in the company of another policeman, he again spoke with Tammy. Tammy said she had been "scared" during the incident, she wanted to remain in Winnipeg with her mother, she did not want to go anywhere with Anthony, and still wanted all five people to be charged with a criminal offense. (Affidavit of Robert Marshall, Pet.Exh. 9, at 3). According to Mrs. Wright, when Tammy returned she was glad to see her and Ernest Wright, she looked scared, shocked and confused, and was ill on the two following days due to the trauma of the incident. (Christina Wright Aff. at 2).

## II. THE STANDARD FOR EXTRADITION

### A. The U.S.--Canada Extradition Treaty And The Extradition Statute

Extradition procedure in the United States is governed by 18 U.S.C. §§ 3181-3195. The country seeking extradition submits a request to our government through diplomatic channels, supported by evidence sufficient to show (1) that the individual is the person sought for the crimes charged, (2) that

the crimes are listed as extraditable offenses in the Treaty and (3) that there is sufficient justification for the individual's arrest had the charged crime been committed in the United States. *Eain v. Wilkes*, 641 F.2d 504, 508 (7th Cir.1981) *cert. denied,* 454 U.S. 894, 102 S.Ct. 390, 70 L.Ed.2d 208 (1981).

If the State Department approves the request, it is forwarded to the United States Attorney in the district where the person to be extradited may be found. The United States Attorney may then file a complaint and seek an arrest warrant from a Magistrate Judge. If a warrant issues, the Magistrate Judge conducts a hearing under 18 U.S.C. § 3184 to determine whether there is probable cause (under federal standards) to believe the person to be extradited committed the crime or crimes charged.[8] If the Magistrate Judge finds probable cause exists, he certifies this fact to the Department of State, which

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[8] Title 18 United States Code § 3184 provides:

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered.... If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

may then extradite the respondent. *Eain v. Wilkes*, 641 F.2d at 507-508.

The United States government has provided a copy of the Extradition Treaty between the United States and Canada currently in force and in force at the time of the alleged kidnapping (the "Treaty").[9] Article 2 of the Treaty as amended states:

> (1) Extradition shall be granted for conduct which constitutes an offense punishable by the laws of both Contracting Parties by imprisonment or other form of detention for a term exceeding one year or any greater punishment.
>
> (2) An offense is extraditable notwithstanding
>
> (i) that conduct such as interstate transportation or use of the mails or of other facilities affecting interstate or foreign commerce, required for the purpose of establishing jurisdiction, forms part of the offense in the United States, ....

(Pet.Exh. 2).

Respondents are charged with kidnapping and forcible seizure under Section 279 of the Criminal Code of Canada, which provides that

> (1) Everyone who kidnaps a person with intent (a) to cause him to be confined or imprisoned against his will, (b) to cause him to be unlawfully sent or transported out of

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[9] The Treaty was signed in 1971, amended by an exchange of notes in 1974, ratified by both countries in 1975 and 1976, and entered into force March 22, 1976. It was further amended by a protocol signed in 1988 and entering into force November 26, 1991. (Pet. Exhs. 2, 3).

> Canada against his will, or, (c) to hold him for ransom or to service against his will, is guilty of an indictable offence and liable to imprisonment for life. (2) Everyone who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of an indictable offense and liable to imprisonment for a term not exceeding ten years. (3) In proceedings under this section, the fact that the person ... did not resist is not a defence unless the accused proves that the failure to resist was not caused by threats, duress, force or exhibition of force.

(Affidavit of John Douglas Montgomery, Pet.Exh. 8 at 9, 10). Mr. Montgomery, a Canadian barrister and solicitor, states that the distinction between misdemeanors and felonies has been abolished in Canada, but generally speaking "indictable offenses" represent the more severe category of crimes, as opposed to "summary conviction offenses." (Montgomery Aff., Pet.Exh. 8 at 5). In his supplemental affidavit, he explains that the offense of kidnapping is defined by paragraph (1), while the lesser included offense of forcible seizure is defined by paragraph (2). He states that the difference between the two is that kidnapping is a criminal false imprisonment aggravated by either secretly confining or intending to secretly confine the victim or by transporting or intending to transport him out of the country. (Montgomery Supplemental Aff., Pet.Exh. 16, at 1-3). The respondents are charged with both offenses.

Section 21 of the Criminal Code of Canada makes those who aid in the commission of a crime equally culpable:

> 21. (1) Every one is a party to an offence who
> (a) actually commits it,
> (b) does or omits to do anything for the purpose of aiding any person to commit it; or,

(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

(Montgomery Supp.Aff., Pet. Exh. 16 at 10).

Analogous provisions of American law include the federal kidnapping statute, which provides, in pertinent part, that:

[w]hoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when ... the person is willfully transported in interstate or foreign commerce....

18 U.S.C. § 1201(a).[10] Under 18 U.S.C. § 2 co-participants are equally responsible:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The Illinois kidnapping statute provides that

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[10] Section 1201(c) contains a provision criminalizing conspiracy to violate § 1201.

> (a) Kidnapping occurs when a person knowingly: (1) [a]nd secretly confines another against his will, or (2) [b]y force or threat of imminent force carries another from one place to another with intent secretly to confine him against his will, or (3) [b]y deceit or enticement induces another to go from one place to another with intent secretly to confine him against his will. (b) Confinement of a child under the age of 13 years is against his will within the meaning of this Section if such confinement is without the consent of his parent or legal guardian.

720 ILCS 5/10-1. One who, before or during the commission of an offense solicits, aids, abets, or agrees or attempts to aid or abet the principal with the intent to promote or facilitate the commission of the offense is legally accountable for the offense. 720 ILCS 5/5-2(c).

Both of the Canadian crimes, with which the respondents are charged, would be comprehended within either the federal or state kidnapping statutes, since both statutes embrace confinement against the will of the victim by force or threat of force.

B. Does Dual Criminality Apply to the Conduct Charged?

Respondents argue that the requirement of dual criminality has not been met because Anthony DeSilva was Tammy's guardian in Illinois. The respondents' actions, accordingly, would have been lawful had they been taken in Illinois, and so respondent may not be extradited.

Respondents are correct that if they had taken Tammy from her home in Illinois against her will they would not have committed a crime. Appointment of a guardian of the person

rests upon a finding that "because of his disability he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the care of his person." 755 ILCS 5/11a-3. Such a finding has indeed been made in Tammy's case. (Resp.Exh. 13). Thus, to the extent ordered by the court and under its direction, the guardian of the person has legal custody of the ward. 755 ILCS 5/11a-7. The Probate Court did appoint Anthony plenary guardian with no restrictions.

We have found no case law addressing the alleged kidnapping of a ward by her guardian. The kidnapping statute, however, expressly provides that the consent of a child's parent or guardian is an absolute defense to a kidnapping charge. *People v. Marin*, 48 Ill.2d 205, 209, 269 N.E.2d 303, 305 (1971). We therefore believe--and the government does not dispute--that the consent of the guardian of a disabled adult would also have been an absolute defense had the acts taken place in Illinois. Tammy's power of decision regarding her care was vested in Anthony, and if Tammy had been living in Illinois he could not be guilty of kidnapping or unlawful confinement in taking her to a medical examination against her will.

Nevertheless, respondents are mistaken in their belief that because they would have been privileged to act in this way in Illinois they cannot be extradited to Canada. The Treaty states that "[e]xtradition shall be granted for conduct which constitutes an offense punishable by the laws of both Contracting Parties by imprisonment or other form of detention for a term exceeding one year or any greater punishment." Respondents read "conduct" to mean the particular acts alleged; because the respondents would have been acting legally had they acted in Illinois, they may not be extradited. The historical context, however, gives "conduct" a

different meaning. The language quoted above comes from Article I of the 1988 protocol setting forth language replacing Article 2 of the Treaty. The superseded Article 2 defined extraditable offenses in terms of an annexed schedule:

> (1) Persons shall be delivered up according to the provisions of this Treaty for any of the offenses listed in the Schedule annexed to this Treaty, which is an integral part of this Treaty, provided these offenses are punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year.

(Treaty of 1971, Pet.Exh. 3 at 4).

We note that "conduct which constitutes an offense" in the revision takes the place of a list of offenses in the original Treaty, in this context the phrase does not refer to the particular conduct with which the individual to be extradited is charged, but the conduct understood as defining the offense under the law of each country. The conduct defining the offense of kidnapping under both U.S. and Canadian law is confinement or transportation of the victim against the victim's will without lawful authority, not confinement or transportation against the victim's will under the purported authority of an Illinois guardianship.

Because there is probable cause to believe that Anthony and the other respondents confined and transported Tammy against her will, as will be more fully discussed below, the question is whether Anthony had lawful authority to do so. In Illinois (and presumably in Manitoba), if the alleged victim is the legal ward of the accused and, as here, the transportation is plausibly in the ward's interest, the accused cannot be guilty of kidnapping because in the eyes of the law it is not against the ward's will. The guardian has the

power to consent on behalf of the ward and the ward has no legally cognizable will contrary to that of her guardian. This, which forms the core of respondents' arguments, however, presupposes a legally recognized guardianship (in particular under Canadian law).

A privilege granted by a sovereign government to engage in conduct that would otherwise be criminal need not be recognized by another sovereign on its own soil. Respondents Kulekowskis and LoBue, as Chicago police officers, may arrest on the streets of Chicago any person whom they have probable cause to believe has committed a felony, and employ reasonable force in doing so. They may not do this outside Illinois where they have no license to commit what would otherwise be an assault. If there is probable cause to believe that Tammy was transported out of Canada against her will, and Anthony had no authority under Canadian law to take her, the respondents may be extradited.

Respondents also raise a second version of this argument. Conceding, arguendo, that the true parallel would be a guardian under Canadian law who abducted his ward from Illinois, respondents contend that an Illinois court would recognize the Canadian guardianship as a matter of comity and an Illinois judge would have dismissed the kidnapping charges. In support of their argument, respondents offer the affidavit of former Illinois Judge and State's Attorney Louis P. Garippo who states the advanced premise. Therefore, they reason, since an Illinois court would not have convicted them of kidnapping had they acted pursuant to a Canadian guardianship, the requirements of the Treaty have not been met.

Again, respondents are mistaken. Illinois law does not provide for automatic recognition of a foreign guardianship

order. Comity does not require the recognition of a foreign decree establishing guardianship over a child residing in Illinois. People ex rel. *Noonan v. Wingate*, 376 Ill. 244, 33 N.E.2d 467 (1941); *Republic of Iraq v. First National Bank of Chicago*, 350 F.2d 645, 649 (7th Cir.1965).

Respondents note that in these cases the foreign court appointing the guardian did not have jurisdiction over the child when the appointment was made. Nevertheless, *Noonan* states the rule in absolute terms; it is not conditioned on the foreign court's lack of jurisdiction over the child. The child in question in Noonan was an orphan whose father and mother had been domiciled in Massachusetts. Shortly after the father died, the father's mother petitioned the probate court of Middlesex, County, Massachusetts to appoint her as guardian of the child, alleging that the child was living in Illinois and had property in Middlesex County. She was named guardian and sought to take custody of the child in Illinois, arguing that both comity and the full faith and credit clause required recognition of the Massachusetts guardianship.

The Illinois Supreme Court upheld the circuit court's denial of the mother's habeas corpus action seeking custody of the child. The court first pointed out that in appointing a guardian the court had to act in the best interest of the child, and could not make a proper determination without the child or her present guardians before it. Perhaps realizing that an attack on a foreign court's procedure was a weak defense to the full faith and credit requirement, the court bolstered its argument by noting that decrees entered in divorce actions disposing of the custody of a child then outside the state where the decree is entered are generally held not to be entitled to full faith and credit in custody proceedings in another state. *Noonan*, 376 Ill. at 248, 33 N.E.2d at 469.

The grandmother argued that the child was legally a Massachusetts domiciliary, giving that court jurisdiction. The Illinois Supreme Court acknowledged that the father had remained a Massachusetts domiciliary, and since at common law a child kept her father's domicile, the child was a Massachusetts domiciliary as well. Nevertheless, the court held that its power over the child derived from the child's physical presence in the state, not its domicile. While the court would give consideration to the decision of the Massachusetts court, it was not required to enforce it.

The court quoted at length from a Massachusetts decision, *Woodworth v. Spring*, 4 Allen 321 (1862), where an Illinois court had named the plaintiff guardian of an orphan living in Illinois. With the Illinois guardian's consent, the child had been taken temporarily to Massachusetts where another guardian was appointed. The Illinois guardian brought suit to regain custody of the child and return him to Illinois. The court in Massachusetts declined to turn the child over to the Illinois guardian, saying:

> The question whether a person within the jurisdiction of a State can be removed therefrom depends, not on the laws of the place whence he came or in which he may have his legal domicile, but on his rights and obligations as they are fixed and determined by the laws of the State or country in which he is found.... The comity of a State will give no effect to foreign laws which are inconsistent with or repugnant to its own policy, or prejudicial to the rights and interests of those who are within its jurisdiction. Even the parental relation, which is everywhere recognized, will not be deemed to carry with it any authority or control beyond that which is conferred by the laws of the country where it is exerted. The patria potestas of a foreign parent over his child is not that which is vested in him by the laws of the place of his

> domicile but that which exists by virtue of the parental relation in the country where the father seeks to enforce his authority.... Every nation has an exclusive right to regulate persons and property within its jurisdiction according to its own laws, and the principles of public policy on which its own government is founded. It results from these principles, that persons exercising offices and trusts with which they are clothed by virtue of the laws of a particular State or country can not undertake to transfer their power or capacity to act, so as to control persons or property situated beyond the limits of the jurisdiction of the government or sovereignty from which their authority is derived. An administrator appointed under the laws of a foreign State can not act as such in this commonwealth. Nor, for like reasons, can a guardian appointed by virtue of the statutes of another State exercise any authority here over the person or property of his ward. His rights and powers are strictly local, and circumscribed by the jurisdiction of the government which clothed him with the office.

*Noonan*, 376 Ill. at 250-51, 33 N.E.2d at 470-71. In *Woodworth* the Illinois court had jurisdiction of the child at the time it named the plaintiff as guardian, but the Massachusetts court did not consider itself bound to recognize the guardian's authority. The foregoing quotation confirms our reading of Noonan as stating an unconditioned rule that comity never requires the recognition of a foreign guardianship over a child found within the state. Of course, the court may defer to the foreign court in its discretion. *See, e.g., In the Matter of the Guardianship of Arnold*, 114 Ill.App.2d 68, 252 N.E.2d 398 (5th Dist.1969) (not abuse of discretion to dismiss petition for appointment of guardian, deferring to Ohio custody decree).

*In re Marriage of Silvestri-Gagliardoni*, 186 Ill.App.3d 46, 134 Ill.Dec. 106, 542 N.E.2d 106 (1st Dist.1989), cited by respondents, is not to the contrary. While the court there refused to reopen an Italian custody decree, it based its ruling on the Uniform Child Custody Jurisdiction Act, inapplicable here, and in any event did not indicate that it was powerless to do so.

We presume the same rule would apply to a guardianship of a mentally disabled person. While an Illinois court might defer to a Canadian guardianship appointment as a matter of comity, and an Illinois prosecutor might decline to prosecute kidnapping charges against a foreign guardian in these circumstances, these are discretionary determinations. The operative word of the Treaty is "punishable." Unless a foreign guardianship order would be an absolute bar to criminal proceedings, respondents conduct would be punishable under Illinois law, even if the chance of actual prosecution, conviction and punishment were remote. Respondents have not shown such a bar, and the Treaty's requirement of double criminality has been met.

C. Probable Cause Defined

An extradition proceeding is not a trial, but is similar to a preliminary hearing. *Bovio v. United States*, 989 F.2d 255, 259 (7th Cir.1992). As in preliminary hearings, hearsay testimony is admissible, and neither the Federal Rules of Evidence nor the Federal Rules of Criminal Procedure apply. *Id.* and n. 3. The respondent has no right to attack the credibility of the witnesses against him. He may not contradict the demanding country's evidence, but may only offer evidence to clarify or explain it. *Id.*; *Eain*, 641 F.2d at 511. The foreign government is not required to present its entire case. The evidence presented need only support a

reasonable belief that the respondent is guilty of the crimes charged. *Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2d Cir.1990). It is not the place of American courts to try a person accused of violations of another country's criminal laws; that is the task of the courts of the requesting country.

Probable cause is a flexible concept. According to the Supreme Court:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is correlative to what must be proved.

*Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949). Evidence to "block out" the essential elements of the crime is sufficient. *Collins v. Loisel*, 259 U.S. 309, 317, 42 S.Ct. 469, 472, 66 L.Ed. 956 (1922). The Seventh Circuit has called probable cause "a soundly-based belief that the suspect may have committed a crime." *Gramenos v. Jewel Cos., Inc.*, 797 F.2d 432, 440 (7th Cir.1986). Probable cause "is less than a rule of more-likely-than-not, but how much less depends on the circumstances." *Id.* at 438. We now apply this definition to the central issue before us--whether the petitioner has shown probable cause with respect to all of the respondents.

## III. DETERMINATION OF PROBABLE CAUSE

A finding of probable cause that the respondents committed the charged crimes consists of several elements. The petitioner must show that the respondents took Tammy from her home or confined her either against her will or

without lawful authority. Respondents do not deny that they transported Tammy. They contend that the petitioner has not presented probable cause to show that the transportation was against her will; alternatively, they contend that the petitioner has not shown that Anthony, as her guardian, did not have lawful authority to transport her even against her will.

A. Tammy Was Confined And Transported Against Her Will

On the first point, contrary to respondents' assertions, we easily find in this record sufficient evidence establishing the existence of probable cause to believe Tammy was taken against her will. In this regard competent and reliable evidence showed that Tammy was indeed taken against her will, and that she consistently, on more than one occasion, and throughout the unfortunate episode, expressed that will not be taken. Evidence establishing her will not to be taken is described at the very moment Tammy is removed from her home by respondents when she is observed as being scared, shocked, crying and kicking as she was taken from her bed. (Affidavit of Christina Wright, Pet.Exh. 15). Later at the Canadian-U.S. Border, she unequivocally indicates to authorities there that she was taken against her will. (Vander-Graaf Affidavit, Pet.Ex. 15, at 7). She further communicated that she did not want to go to Chicago, but wanted to return home. (Mach Investigative Report, Pet.Ex. 11 at 2-4). Even later in the day, when reunited with her mother at a Winnipeg hospital, she showed significant signs of illness and trauma occasioned from her experience that day. (Affidavit of Christina Wright). Finally, a day after the incident, Tammy communicated to a Winnipeg police officer that she understood the situation, that she did not want to go anywhere with Anthony, and that she desired that all respondents be criminally charged for what they did to her. (Affidavit of Robert Marshall, Pet.Ex. 9 at 3).

We are not persuaded that Tammy's disability deprived her of a recognizable will. We are satisfied, based on the reports of those who interacted with her, that she had sufficient understanding to meaningfully give or withhold consent. (Mach Investigative Report, Pet.Exh. 11 at 2-4). It is not dispositive that she has limited ability to reason and to communicate and has been adjudged incompetent to manage her affairs. The victim's capacity to give consent, is to be determined in relation to "the very acts in question." *Chatwin v. United States*, 326 U.S. 455, 462, 66 S.Ct. 233, 236, 90 L.Ed. 198 (1946). In this case, she had only to be able to understand that she was being taken away by Anthony and express her approval or disapproval; this she did continually and repeatedly throughout her ordeal. In *Chatwin*, a fifteen-year-old girl who had demonstrated a mental age of seven on an intelligence test was considered capable of consenting to accompany the accused. We believe Tammy was capable of deciding that she did not want to go with Anthony and communicating this to those who saw her. She manifested her reluctance to go with Anthony on more than one occasion, and was fully aware she was being taken against her will.

Respondents further argue that Tammy's disability rendered her legally incompetent to give evidence.[11] Respondents point out that Tammy has been certified as mentally disabled by courts in both Illinois and Manitoba. Consequently, her non-verbal communications to Mrs. Wright and her statement to Sergeant Marshall after the incident that

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[11] To this end see BRIEF OF THE RESPONDENT ANTHONY DESILVA, section I, entitled "ALL STATEMENTS AND CONDUCT OF TAMMY DESILVA ARE INADMISSIBLE IN THIS CASE ..." pp. 16-21.

she had felt "scared" should be excluded, resulting in a complete lack of evidence on this point.

It is unclear what limits there may be on the evidence that may be accepted in an extradition proceeding. As noted above, the Federal Rules of Evidence do not apply, and a fortiori, state rules do not apply either. To the extent that it offers some guidance, we note that under Rule 601 of the Federal Rules of Evidence all persons are presumed competent, and mental disability is not a disqualification. The court may conduct an in camera examination of the witness and may in unusual cases order a mental examination to determine whether the witness can contribute meaningful and useful testimony, but there are no automatic disqualifications. See *United States v. Gutman*, 725 F.2d 417, 420 (7th Cir.1984); J. Weinstein and M. Berger, Weinstein's Evidence ¶ 601[04] at 601-26--601-32.

Respondents have offered affidavits from mental health professionals who have examined Tammy. We will ignore the examinations made in 1988 at the time Anthony was appointed her guardian because they show a lower level of mental functioning than the later examinations. On August 8, 1991, six months before the alleged kidnapping, Winnipeg physician Dr. Chris Engel examined Tammy and found that she had a complete loss of short term memory and she could not communicate verbally. (Resp.Exh. 23). An examination by Dr. Jack Rusen on November 28, 1991, showed that Tammy's short-term memory was poor, her reasoning was impaired, and she had limited ability to communicate. (Resp.Exh. 24). A year following the alleged kidnapping, she was examined by psychologist Dr. Jack Arbit, who states:

> 6. In my opinion, because of her mental condition, the severe and significant diffuse organic brain syndrome,

> Tammy DeSilva cannot understand right from wrong and does not appreciate the nature of an oath. Her injury has also caused her to be so lacking in understanding and memory that she cannot remember past events, understand or perceive the significance of events or communicate an accurate perception of events. She cannot be a trustworthy witness. Depending upon the questioning she can very easily be manipulated into giving answers which she does not understand or necessarily agree with and can very quickly thereafter be manipulated into giving opposite answers to the same questions.

(Arbit Aff., Resp.Exh. 36 at ¶ 6).

Giving respondents' arguments as much credence as possible, Tammy's memory problems and suggestibility might make only her statement to Sergeant Marshall of the Winnipeg Police Department unreliable when she was asked to recall her feelings regarding events that had occurred several days before--although we have concern to doubt even that. As was shown in her exchanges with law enforcement officers at the border, however, she was fully capable of stating what she wanted in the present. Additionally, her non-verbal "statement,"--her evident distress at the time she was taken--is sufficient evidence that she was taken against her will. All of this, for our purposes, is sufficient to support a finding of probable cause. The respondents' objection is overruled, and we find there is probable cause to believe the respondents confined and transported Tammy against her will.

B. Tammy Was Confined And Transported Without Lawful Authority

Whether Tammy was confined and transported pursuant to lawful authority depends, of course, on the law of

Canada--the place of her taking. "To determine foreign law a district court may look to any relevant source, including expert testimony." Overseas Development Disc Corp. v. Sangamo Const. Co., Inc., 840 F.2d 1319, 1324 (7th Cir.1988). Petitioner has furnished an affidavit of Bryan Schwartz, a barrister, solicitor and law professor at the University of Manitoba.[12] Professor Schwartz states the position of the common law of Canada regarding foreign guardians of children:

> As a matter of public policy, the authority of a foreign guardian over the person of his or her ward present within any of the provinces or territories of Canada--should a dispute arise as to her care and control--will not automatically be recognized and enforced. The same principles apply here as in foreign custody orders.

(Schwartz Affidavit, Pet.Final Supp.Exh. 2. at 9) (quoting Castel, Conflicts of Law (3rd ed.)) This rule has been superseded with respect to children by Section 82 of the Child and Family Services Act that provides for recognition of foreign child custody orders. No statute provides for automatic recognition of the powers and rights of the guardian of a mentally incompetent adult. *Id.*

Professor Schwartz again cites Castel for the proposition that "a duly appointed foreign representative of a mentally incompetent person to whom the management of his or her person or property was committed by the foreign court cannot remove him or her from the jurisdiction without having

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[12] Petitioners have also offered a shorter and more conclusory memorandum written by Crown Counsel Joy Cooper. (Pet. Exh. 17). Because Professor Schwartz's affidavit is more detailed and considered, we will address it rather than Cooper's memorandum.

been so authorized by the appropriate authorities." *Id.* at 10. Schwartz qualifies this position somewhat, however, in the case of a brief visit of an incompetent and her guardian. A guardian who brings his ward into Canada, perhaps as a tourist, should not be afraid that he will be required to seek a court order before taking the ward back out of the country:

> There might be exceptional circumstances in which Manitoba law would allow a foreign guardian to exercise control over an individual without the formal approval of local authorities. These would be cases in which Manitoba's connection with the individual are minimal and there is no reason for provincial authorities to be concerned about the individual's well-being. Suppose a mentally incompetent person was a citizen of the United States and ordinarily resident in Illinois. Her guardian takes her for a two-day vacation to Manitoba. While in Manitoba, there are no controversial decisions to be made about her personal or financial affairs, and no one else is claiming custody over her. In these circumstances, legal "common sense" suggests that Manitoba law might allow the foreign guardian to exercise control over their person, even in the absent [sic] of formal approval by local authorities.
>
> The facts of the DeSilva case, however, appear to be very far from the "de minimus" hypothetical case just presented. Mrs. DeSilva had been living in Manitoba for some time; her parents, not her husband, were looking after her, the decision to participate in the legal proceedings was a significant one; Mr. DeSilva had a possible legal conflict of interest in the accident litigation; the original Illinois order was several years old, and there were strong reasons to believe that Mrs. DeSilva was no longer mentally incompetent.

*Id.* at 13.

In response, amicus curiae Fraternal Order of Police point out that a statement in McLeod, The Conflict of Laws (Calgary, 1983), a treatise cited by Schwartz, undermines Schwartz's position. We will quote at some length to give a fair presentation of McLeod's views. He first states a general rule:

> A foreign curator has no right, as such, to control the person of the mental incompetent in the local jurisdiction. In a proper case, however, arrangements can be made for handing over the mental incompetent to the foreign curator. A representative appointed by a foreign court cannot remove the mental incompetent from the jurisdiction without an authorization from the appropriate local authorities.

McLeod at 315 (emphasis in original). However, he then states:

> As indicated, a foreign representative has no automatic authority over either the person of a local mental incompetent or the property of a mental incompetent situate within the territorial jurisdiction of the province. However, where no local representative has been appointed, the rights conferred upon the representative of the mental incompetent by the foreign court of domicile or residence are entitled to recognition. In some cases the foreign representative's right may be subject to judicial discretion. This discretion arises where the property in question is in the custody of the court or can only be reached pursuant to the court's jurisdiction, with respect to trust property where the mental incompetent is domiciled but not resident within the jurisdiction, or

where the property is stocks or shares registered in the name of the mental incompetent.

*Id.* at 315-16 (emphasis added).

The parties dispute the significance of the emphasized sentence. Petitioner argues that the sentences following it and the statement of the general rule preceding it establish that the only rights "entitled to recognition" relate to the incompetent's moveable property. To the contrary, the preceding sentence clearly refers to authority over the incompetent's person, and the word "however" can reasonably be understood as limiting it.

This, however, does not conflict with the rule stated earlier, that a representative appointed by a foreign court cannot remove the mental incompetent from the jurisdiction without authorization from appropriate local authorities. It is those authorities that should, in the absence of countervailing reasons, "recognize" the rights of the foreign guardian. As the petitioner points out, respondents did not seek to have Anthony's guardianship "recognized" by a Canadian court. While it may well be that "appropriate local authorities" includes not only a court, but the Winnipeg police authorities, Anthony, through his lawyer, did not attempt to obtain official recognition of his authority from the Winnipeg Police Department, but merely made an anonymous inquiry.

That brings us to what Professor Schwartz has called the "de minimus" exception. Counsel for amicus curiae Fraternal Order of Police argue that there should be a clear rule; that the line between the "de minimus" case of a vacationing Illinois resident cited by Professor Schwartz and this case is difficult to ascertain. To this we have two responses. First, if the dividing line is unclear, it is not our

place to clarify Canadian law. All we can do is acknowledge that a Canadian court could find that the respondents' conduct fell on the culpable side of the line. Second, whatever may be the scope of the exception--if there is one--for short visits by foreigners subject to foreign guardianships, this case is unlikely to fall within it. Tammy had been living with her mother in Winnipeg for more than two years and had been receiving Canadian health care benefits. Anthony had not visited Tammy in more than a year and a half. In these circumstances we easily conclude that respondents acted at their peril in relying on an Illinois guardianship order.[13]

C. Respondents' Alleged Good-Faith Belief That They Were Acting Lawfully

Petitioner has shown probable cause to believe that Anthony confined and transported Tammy out of Canada without lawful authority and against her will. Petitioner has also shown probable cause to believe that each of the other respondents knowingly aided and abetted him in doing so. Each accompanied him to Winnipeg for the express purpose of bringing Tammy to Chicago. There is no evidence that Tammy's willingness or unwillingness to leave was of any concern to them, and we can infer that Tammy's unwillingness was manifest to them. However, respondents argue that even if Anthony's status as Tammy's guardian gave him no

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[13] Some of the distinctions mentioned by Professor Schwartz are probably immaterial. Her guardian's rights should not be upset because "there were strong reasons to believe that Mrs. DeSilva was no longer mentally incompetent." The status of an incompetent should not be altered except by court order, lest the guardian's authority dissipate with every lucid interval. Nor should it be relevant that a "significant decision" was to be made. That is what guardians are for. What is dispositive is that Tammy had been in Canada for an extended period of time in which she had not been in the physical custody and care of her guardian.

authority under Canadian law, to transport Tammy against her will, they believed it did, negating criminal intent.

The common law, both state and federal, distinguishes between a mistake of law and a mistake of fact. "Everyone is presumed to know the law, both common and statutory. An honest mistake of fact will generally shield one from a criminal prosecution, but one's ignorance of the law furnishes no exemption from criminal responsibility for his acts." People v. Cohn, 358 Ill. 326, 193 N.E. 150, 153 (1934). "The basic tenet in this area of criminal law is that 'an honest mistake of fact negatives criminal intent,' whereas '[a] mistake of law ... generally will not excuse the commission of an offense.'" *United States v. Anton*, 683 F.2d 1011, 1017 (7th Cir.1982), *quoting United States v. Barker*, 546 F.2d 940, 946 (D.C.Cir.1976). *See Cheek v. United States*, 498 U.S. 192, 199, 111 S.Ct. 604, 609, 112 L.Ed.2d 617 (1991).

Respondents' alleged mistake is a mistake of law, but a mistake of a peculiar kind.[14] It is one thing to be mistaken as to the criminality of an act, i.e., whether it violates the law, and another to mistake the nature of the act itself. The former mistake is usually an excuse only if the defendant had no reasonable way of ascertaining the law, or reasonably relies on the interpretation of an official authorized to interpret it. The latter, because it negates the required mental state, can be a defense, although courts usually require that the mistake be reasonable. See generally, 1 W. LaFave and A. Scott, *Substantive Criminal Law* at § 5.1 pp. 575-596 (1986). Here,

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[14] Respondents cannot successfully claim a mistake of fact, either that they mistakenly believed that Tammy wanted to go with Anthony or that she was mentally incapable of having a will of her own. They may not controvert the petitioner's evidence to the contrary, and that evidence meets the standard of probable cause.

the mistake was of this latter kind. Respondents are not claiming that they were unaware that taking a person from her house against her will was a crime in Manitoba. Their mistake was in believing that Anthony's guardianship was effective there, permitting his will to substitute for hers in such matters. We have not found an Illinois opinion dealing with this kind of a mistake of law.[15] Nevertheless, § 4-8 of the Criminal Code, 720 ILCS 5/4-8, codifies the mistake of law defense and provides in pertinent part:

> (a) A person's ignorance or mistake as to a matter of either fact or law, except as provided in Section 4-3(c) above, is a defense if it negatives the existence of the mental state which the statute prescribes with respect to an element of the offense.[16] (b) A person's reasonable belief that certain conduct does not constitute a criminal offense is a defense if: (1) The offense is defined by an administrative regulation or order which is not known to him and has not been published or otherwise made reasonably available to him, and he could not have acquired such knowledge by the exercise of due diligence pursuant to facts known to him; or (2) He acts in reliance upon a statute which later is determined to be invalid; or (3) He acts in reliance upon an

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[15] In *People v. Weiss*, 276 N.Y. 384, 12 N.E.2d 514 (1938), the New York Court of Appeals held that a person who believed in good faith that he was making a lawful citizen's arrest could not be convicted of kidnapping, when the statute defined the offense as "seiz[ing], confin[ing] ... another, with intent to cause him, without authority of law, to be secretly confined or imprisoned...."

[16] Section 4-3(c) of the Criminal Code, 720 ILCS 5/4-3(c) provides: Knowledge that certain conduct constitutes an offense, or knowledge of the existence, meaning, or application of the statute defining an offense, is not an element of the offense unless the statute clearly defines it as such.

> order or opinion of an Illinois Appellate or Supreme Court, or a United States appellate court later overruled or reversed; [or] (4) He acts in reliance upon an official interpretation of the statute, regulation or order defining the offense, made by a public officer or agency legally authorized to interpret such statute. (c) Although a person's ignorance or mistake of fact or law, or reasonable belief, described in this Section 4-8 is a defense to the offense charged, he may be convicted of an included offense of which he would be guilty if the fact or law were as he believed it to be. (d) A defense based upon this Section 4-8 is an affirmative defense.

In *People v. Sevilla*, 132 Ill.2d 113, 138 Ill.Dec. 148, 154, 547 N.E.2d 117, 123 (1989), the Illinois Supreme Court summarized: "a mistake as to a matter of law which negates the existence of the mental state element of the offense is a defense; however, a mistake as to whether certain conduct constitutes an offense is not a defense."[17]

The Seventh Circuit has recognized a limited defense when the mistake of law is such a collateral mistake:

> The traditional bar to a mistake of law defense is based on the policy that "all men should know and obey the law...." *United States v. Barker*, 546 F.2d at 947. With a collateral mistake of law, however, even if the defendant is charged

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[17] The court in Sevilla stated that a reasonable belief that one's conduct does not constitute an offense is a defense only if the test of Section 4-8(b) is met. However it did so in response to the defendants' contention that she relied on instructions on a tax form stating that failure to file would subject her to civil penalties as assurance that doing so would not subject her to criminal penalties. We therefore do not read Sevilla as thereby excluding the kind of mistake here, where the legal effect of a collateral matter--in this case, the guardianship order-- constitutes the alleged mistake.

> with knowledge of the prohibition, his belief negatives criminal intent in much the same way as an honest mistake of fact. Thus in cases when application of the traditional rule would be "peculiarly unjust or counterproductive," courts have recognized a limited mistake of law defense, limited by the fact that the accused's mistake must be objectively reasonable under the circumstances presented.

*Anton*, 683 F.2d at 1018. In *Anton*, the defendant, having once been deported, was forbidden by 8 U.S.C. § 1326 to re-enter the United States without the express consent of the Attorney General. The defendant testified that after his deportation he had a series of dealings with United States officials, had received a new visa and gained readmission through an Immigration and Naturalization Service checkpoint. The district court instructed the jury that these dealings were irrelevant and that the question was solely whether he had received the express consent of the Attorney General. The Seventh Circuit held that the defendant should have been permitted to show that he reasonably believed that he had received such consent. His supposed mistake was not ignorance of the law forbidding his re- entry, but the legal effect of certain facts, i.e., that they manifested the consent of the Attorney General.

This is the sort of mistake the respondents claim--that they were reasonably mistaken as to the legal effect of Anthony's guardianship over his wife. This defense, however, under both Illinois and Federal law, is an affirmative defense that must be pleaded and proved by the accused. In this regard the law is clear that a court considering an extradition petition need not consider evidence of affirmative defenses in its probable cause determination. In a 1913 opinion, the Supreme Court held that it was proper to exclude evidence of the respondent's insanity in determining whether there was

probable cause to extradite him from New Jersey to Italy to stand trial for murder:

> [T]he examining magistrate did not exceed his authority in excluding evidence of insanity ... If it was offered to show insanity at the time of the commission of the crime, it was obviously a defense which should be heard at the time of his trial, or by a preliminary hearing in the jurisdiction of the crime, if so provided for by its laws. By the law of New Jersey, insanity as an excuse for crime is a defense, and the burden of making it out is upon the defendant. [citations] A defendant has no general right to have evidence exonerating him go before a grand jury, and unless the prosecution consents, such witnesses may be excluded. [citations]

*Charlton v. Kelly*, 229 U.S. 447, 462, 33 S.Ct. 945, 950, 57 L.Ed. 1274 (1913). *See Collins v. Loisel*, 259 U.S. 309, 315-16, 42 S.Ct. 469, 471-72, 66 L.Ed. 956 (1922); *Romeo v. Roache*, 820 F.2d 540, 545 (1st Cir.1987).

Nevertheless, a magistrate judge has wide discretion in admitting evidence in extradition proceedings. "There is not and cannot well be any uniform rule determining how far an examining magistrate should hear the witnesses produced by an accused person." *Charlton*, 229 U.S. at 461, 33 S.Ct. at 949. Since evidence of an affirmative defense seeks to explain rather than contradict the petitioner's evidence, we believe we have discretion to consider it. Further, the petitioner has impliedly consented to our doing so. Petitioner has not taken the position that the defense of mistake may not be considered, but rather pointed to evidence tending to rebut it. Our considering the evidence does not mean deciding whether the respondents can prove the defense at trial. If we find probable cause to believe that the respondents did not act

upon a good-faith belief that their conduct was lawful, the defense must still be litigated in Canada, not here.

A belief that Anthony had lawful authority would not have been unreasonable. The respondents are not knowledgeable or sophisticated in the law. A common language, similar legal systems, and a long history of friendly relations between this country and Canada has led to a high degree of cooperation and reciprocity between the two governments such that each has waived some of the incidents and prerogatives of sovereignty with respect to citizens of the other. It is plausible that Canada would accept the authority of guardians appointed by United States courts over former United States residents who subsequently moved to Canada, subject to the power of a Canadian court to revoke or change the guardianship. On the other hand, Kulekowskis and LoBue, as police officers, could be expected to know that an order of the Circuit Court of Cook County would not be self-enforcing, i.e., that interference with Judge Kennedy's order "authorizing" Anthony to take custody of Tammy would not be punished as contempt of a Canadian court. Nevertheless, it would not be unreasonable for them to have believed that without a supervening order from a Canadian court Anthony's transportation of Tammy would not be unlawful.

Petitioner argues that the police officers, who were present in Touhy's office when he spoke with Inspector MacDiarmid, knew that authorization had not been given. But MacDiarmid's responses to Touhy were equivocal. MacDiarmid said it would only be a police matter "if you expected resistance from her to be moved." This could have been taken to mean (a) resistance from Tammy might make her transportation criminal; (b) resistance from either Tammy or third persons could result in a breach of the peace, possibly

requiring police intervention; or (c) resistance from either Tammy or third persons would necessitate police assistance for Anthony to carry out his intended transportation of Tammy.

In any case, respondents only heard Touhy's side of the conversation. They would have heard Touhy say that Tammy "will not resist because she's not in the position to offer it," (Pet.Supp.Exh. 3A at 5). That could mean either that she was so disabled mentally as to be unable to express her will at all, or that she was physically unable to resist. Since moving a person who was unable to resist did not appear to bother MacDiarmid, a reasonable person would not have drawn the conclusion that it would be unlawful to move her if she did not want to go. Both Touhy and MacDiarmid spoke of her "resistance," rather than her willingness or unwillingness, implying that any problem would be her non-cooperation with Anthony rather than his overriding her wishes.

MacDiarmid did suggest that Touhy contact Senior Crown Attorney Miller, and Touhy was heard telling the respondents this. But there is no evidence that Touhy told the respondents such consultation was necessary--and MacDiarmid did not say that it was. It appears from the transcript that MacDiarmid transferred the call to Miller's office but Miller was unavailable. If Touhy decided that he did not need further official reassurances, it would not be unreasonable for the respondents not to have questioned his judgment.

Finally, we come to the fact that Touhy actually advised the respondents that their proposed conduct was lawful. Respondents sought Touhy's advice before going to Winnipeg, and Touhy advised them that "since Anthony's

appointment as guardian of Tammy DeSilva was valid, legally binding and gave him authority to remove his wife to the U.S. for the purpose of his [sic] medical evaluation." (Touhy Affidavit, Resp. Exh. 35 at ¶ 10). Reliance on advice of counsel, a subspecies of the reasonable mistake of law defense, is recognized under federal law in this circuit but does not appear to be recognized by Illinois law.[18] Whether or not advice of counsel is a defense in itself, it is strong evidence of the good faith and reasonableness of respondents' belief.[19]

Petitioner challenges the respondents' good faith, pointing to evidence in the record suggesting that they knew they were violating the law. Petitioner notes the following:

> (1) Respondents lied to Terry Kreitz, the Canadian customs officer who stopped them on their way into Canada, telling him that they were going to celebrate Anthony's wedding anniversary and would stay one or two days. This applies to the DeSilvas, who were traveling together in the first car, and to at least one of the riders in the second car, Kulekowskis, LoBue, or Schon. (Kreitz stated that he

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[18] In order to establish the defense of good-faith advice of counsel, a defendant must establish that:

> (1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report.

*United States v. Cheek*, 3 F.3d 1057, 1061 (7th Cir.1993), *cert. denied*, 510 U.S. 1112, 114 S.Ct. 1055, 127 L.Ed.2d 376 (1994); *Liss v. United States*, 915 F.2d 287, 291 (7th Cir.1990).

[19] We do not suggest that it was reasonable for Touhy to have believed (and opined) that respondents' proposed conduct was lawful.

"received the same answer" as to their purpose for visiting Canada.) (Pet. Final Supp. Exh. 1B at 2).
(2) Anthony brought along Kulekowskis and LoBue to intimidate the Wrights.
(3) The respondents entered Canada late at night and went to Tammy's house early in the morning.
(4) Kulekowskis or LoBue lied to Mrs. Wright, saying that they were taking Tammy to a local doctor. This was said in the presence of the other respondents.
(5) Kulekowskis, LoBue or Albert DeSilva disconnected the telephone when Mrs. Wright tried to use it, and one of them took her list of telephone numbers. Anthony and Schon were in Tammy's bedroom at the time.

Although these actions suggest that respondents were afraid of detection and interception by the police, there is another explanation which, though not morally innocent, does not involve the mental state required for kidnapping. The respondents may have acted as they did in order to prevent the Wrights from taking steps to replace Anthony as Tammy's guardian, thus removing the legal authority the respondents may have probably thought they had.

Touhy's statements to Judge Kennedy on January 31, 1992, (Pet. Supp. Exh. 1) show how Anthony saw the situation. Tammy had been sent to Canada to live with her mother because Canada's national health program would pay for her care. There had been an attempt to have insurance payments to Tammy's estate made directly to the Wrights, making the Wrights directly accountable for them. Anthony, as guardian, had been sending the payments to the Wrights, but the Wrights had not satisfactorily accounted for them and he had ceased doing so. Tammy's estate owed Anthony more than $30,000 that he had spent on Tammy's care before his funds were exhausted.

Now there was a prospect of a sizeable settlement that would pay for her care and make it possible for her to live near Anthony in Chicago permanently. Anthony believed Mr. Wright wanted to put his hands on the settlement money. The Wrights were attempting to have the Canadian court name themselves as Tammy's guardians. The Wrights could be expected to know that once Tammy was taken to Chicago the court in Winnipeg would have no jurisdiction to name them as guardians, and Anthony could keep Tammy in the United States indefinitely. Unless Anthony moved quickly and without warning, the Wrights would replace him as guardian, Tammy would stay in Canada, he could see her again only with their permission, and he might have difficulty recovering the $30,000 he believed he was owed.

The respondents' furtive manner is thus only ambiguous evidence of bad faith in the sense relevant here, and is not inconsistent with a belief that Anthony had legal authority to transport Tammy against her will. They may have been afraid that if they had been forthright about what they were doing, questions might have been raised and by the time they were through answering them the Wrights' lawyer would have obtained a temporary order from the Canadian court-- as in fact he was able to do by 10:00 a.m. that day.

Nevertheless, because the evidence is equivocal, respondents must be extradited. Our hypothetical explanation for their furtive and seemingly underhanded conduct, though supported by the record, was not raised by the respondents themselves. At trial, when the respondents and witnesses can be cross-examined, the court may well decide that the respondents acted as they did because they knew or believed they were acting illegally.

With respect to Schon, however, we find no evidence of bad faith in the record. Kreitz, the customs agent, did not report her saying anything. There is no evidence she knew that it was not the DeSilva's anniversary, or something close to it. Assuming that she knew that the men were lying, it is not established that she had a legal obligation to speak up and contradict them when she herself was not directly asked. She did not lie to Mrs. Wright about where Tammy was to be taken, and it appears she was not in the kitchen with Albert DeSilva, Kulekowskis and LoBue when they prevented Mrs. Wright from using the telephone.

Petitioner points out that when asked why the respondents had not brought Tammy's keyboard communication device along, Schon admitted having noticed it on a table in Tammy's bedroom. (Pet. Exh. 12 at 6). It is a strained speculation that Schon deliberately decided not to bring the keyboard in order to keep Tammy from communicating her wishes. Had she done so, it is unlikely that she would have admitted seeing it when she was interrogated. She probably saw the keyboard, assumed Anthony knew what it was, and acquiesced in what she assumed was Anthony's decision not to bring it along. We find no evidence tending to show that she knew that Anthony did not have legal authority to take Tammy from the house against her will. We accordingly conclude that the petitioner has not shown probable cause to believe that Schon had the requisite intent necessary to commit the offense of kidnapping under either Illinois or Federal law, and her extradition is refused. The other four respondents may be extradited.

## IV. CONCLUSION

For those reasons about stated, the court having jurisdiction over the subject matter and persons of the

defendants in this case, it hereby finds as follows: Petitioner, the United States Attorney for the Northern District of Illinois, appearing on behalf of the Government of Canada, has established that there is probable cause to believe that respondents Anthony DeSilva, Albert DeSilva, Thomas Kulekowskis and Anthony LoBue knowingly confined and transported Tammy Wright DeSilva from her home in Winnipeg, Manitoba, Canada into the United States against her will and without lawful authority. Their alleged conduct would constitute the offense of kidnapping in the State of Illinois, an offense punishable by imprisonment in excess of one year. The requirements of the extradition treaty between the United States and Canada are therefore satisfied and the court certifies that the foregoing respondents are extraditable for trial in Canada on the charged offenses of kidnapping and unlawful restraint. The court finds, however, that petitioner has failed to establish that there is probable cause to believe that respondent Judith Dawn Schon acted with the intention of confining and transporting Tammy Wright DeSilva against her will and without lawful authority, and she may not be extradited.

The United States Attorney for the Northern District of Illinois is directed to forward a copy of this order and certification of extraditability, together with a copy of all the exhibits and testimony given in this matter, to the Secretary of State.

Respondents' MOTION TO DISMISS THE COMPLAINT FOR EXTRADITION is DENIED. Respondents Anthony DeSilva, Albert DeSilva, Thomas Kulekowskis and Anthony LoBue are hereby ordered to surrender to the United States Marshall's office within fifteen days. A copy of this opinion will be sent to the Illinois

Attorney Registration and Disciplinary Commission so that it may investigate the role played by Anthony DeSilva's attorneys in this incident.

# United States Court of Appeals

for the Seventh Circuit
Chicago, Illinois 60604

November 26, 1997

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge

Anthony DeSilva, Albert DeSilva
Anthony J. LoBue, Thomas
Kulekowskis
*Petitioners-Appellees*

Nos. 96-4110 & 97-1038 *v.*

Joseph G. DiLeonardi, United States
Marshal for the Northern District
of Illinois,
*Respondent-Appellant.*

Appeals from the
United States District
Court for the Northern
District of Illinois,
Eastern Division.

Nos. 95 C 3103 &
96 C 7592
George W. Lindberg
and Milton I. Shadur,
*Judges.*

**Order**

Petitioners-appellees filed a petition for rehearing and suggestion of rehearing en banc on November 10, 1997. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-3011

January 27, 1998

Mr. Steven A. Steinbach
Williams & Connolly
725-12th Street, N.W.
Washington, DC 20005

Re: Anthony J. LoBue and Thomas Kulekowskis
v. Joseph G. DiLeonardi
Application No. A-534

Dear Mr. Steinbach:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on January 27, 1998, extended the time to and including April 15, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk

By /s/ Gail B. Johnson
Gail B. Johnson
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-3011

NOTIFICATION LIST

Mr. Steven A. Steinbach
Williams & Connolly
725-12th Street, N.W.
Washington, DC 20005

Hon. Seth P. Waxman
Solicitor General
Department of Justice
Washington, DC 20530

Clerk
United States Court of Appeals for
the Seventh Circuit
219 S. Dearborn Street
Chicago, IL 60604

Title 18 United States Code § 1201: Kidnapping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when: (1) the person is willfully transported in interstate or foreign commerce; (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States; (3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 46501 of title 49; (4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title; or (5) the person is among those officers and employees designated in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of official duties; shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment. (b) With respect to subsection (a) (1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce. (c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life. (d) Whoever attempts to violate subsection (a) shall be punished by imprisonment for not more than twenty years. (e) If the victim of an offense under subsection (a) is an internationally protected person outside the United States, the United States may exercise

jurisdiction over the offense if (1) the victim is a representative, officer, employee, or agent of the United States, (2) an offender is a national of the United States, or (3) an offender is afterwards found in the United States. As used in this subsection, the United States includes all areas under the jurisdiction of the United States including any of the places within the provisions of sections 5 and 7 of this title and section 46501(2) of title 49. For purposes of this subsection, the term "national of the United States" has the meaning prescribed in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)). (f) In the course of enforcement of subsection (a) (4) and any other sections prohibiting a conspiracy or attempt to violate subsection (a) (4), the Attorney General may request assistance from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding. (g) Special rule for certain offenses involving children. (1) To whom applicable.--If-- (A) the victim of an offense under this section has not attained the age of eighteen years; and (B) the offender-- (i) has attained such age; and (ii) is not-- (I) a parent; (II) a grandparent; (III) a brother; (IV) a sister; (V) an aunt; (VI) an uncle; or (VII) an individual having legal custody of the victim; the sentence under this section for such offense shall be subject to paragraph (2) of this subsection. (2) Guidelines.--The United States Sentencing Commission is directed to amend the existing guidelines for the offense of "kidnapping, abduction, or unlawful restraint," by including the following additional specific offense characteristics: If the victim was intentionally maltreated (i.e., denied either food or medical care) to a life-threatening degree, increase by 4 levels; if the victim was sexually exploited (i.e., abused, used involuntarily for pornographic purposes) increase by 3 levels; if the victim was placed in the care or custody of another person who does not have a legal right to such care

or custody of the child either in exchange for money or other consideration, increase by 3 levels; if the defendant allowed the child to be subjected to any of the conduct specified in this section by another person, then increase by 2 levels. (h) As used in this section, the term "parent" does not include a person whose parental rights with respect to the victim of an offense under this section have been terminated by a final court order.

FILED
JUL 17 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1690

# In the Supreme Court of the United States

OCTOBER TERM, 1997

ANTHONY J. LOBUE AND THOMAS KULEKOWSKIS,
PETITIONERS

*v.*

JOSEPH G. DILEONARDI, UNITED STATES MARSHAL
FOR THE NORTHERN DISTRICT OF ILLINOIS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
*Solicitor General*
*Counsel of Record*

JAMES K ROBINSON
*Acting Assistant Attorney General*

J. DOUGLAS WILSON
*Attorney*

*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

The Government of Canada has applied for extradition of petitioners, who attempted to remove a disabled Canadian citizen from Canada against her will at the behest of her husband, whom an Illinois state court appointed as her guardian.

The question presented is whether Canada's charge of kidnapping would violate the dual criminality requirement of the extradition treaty between the United States and Canada.

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# In the Supreme Court of the United States

OCTOBER TERM, 1997

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No. 97-1690

ANTHONY J. LOBUE AND THOMAS KULEKOWSKIS,
PETITIONERS

*v.*

JOSEPH G. DILEONARDI, UNITED STATES MARSHAL
FOR THE NORTHERN DISTRICT OF ILLINOIS

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 125 F.3d 1110. The opinion of the district court (Pet. App. 12a-33a) is reported at 941 F. Supp. 741. The opinion of the magistrate judge (Pet. App. 34a-83a) is reported at 881 F. Supp. 1126.

### JURISDICTION

The judgment of the court of appeals was entered on September 26, 1997 (Pet. App. 84a). A petition for rehearing was denied on November 26, 1997 (Pet. App. 84a). On January 27, 1998, Justice Stevens granted an

extension of time until April 15, 1998, to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This case involves an extradition request for petitioners presented by the Government of Canada to the United States. A magistrate judge in the United States District Court for the Northern District of Illinois certified that petitioners were subject to extradition under the applicable treaty. Pet. App. 34a-83a. Subsequently, the district court granted petitioners' application for a writ of habeas corpus barring their extradition. *Id.* at 12a-33a. The court of appeals reversed. *Id.* at 1a-11a.

1. In December 1987, Tammy DeSilva, a citizen of Canada, and her husband, Anthony DeSilva, were involved in an automobile accident in Monee, Illinois, that rendered Tammy a quadriplegic and caused her severe brain damage. Three months after the accident, an Illinois court appointed her husband as her guardian. In July 1989, Anthony moved Tammy from their home in Illinois to a house the couple owned in Winnipeg, Canada, so that she could receive government-subsidized health care. In Winnipeg, Tammy's parents, Ernest and Christina Wright, cared for her. Pet. App. 1a-2a, 13a.

In the meantime, in June 1988, Anthony DeSilva initiated a lawsuit in Cook County, Illinois, against the driver and owner of the other vehicle involved in the accident that caused Tammy's injuries. That litigation required Tammy to undergo a medical examination. Because Anthony feared that the Wrights would not allow Tammy to return to the

United States for the examination, Anthony secured an order from the Cook County court authorizing him "to take custody of the person of Tammy DeSilva, wherever she may be found, for the purpose of presenting her to a physician or medical care provider for evaluation, treatment, or assessment." Pet. App. 2a, 36a-37a.

Anthony DeSilva then enlisted petitioners, who are Chicago police officers, and Judith Schon, a nurse, to accompany him to the house in Winnipeg where Tammy was staying with her parents. At 6:40 a.m. on February 3, 1992, this group arrived at the Winnipeg home. There, Anthony and his companions carried Tammy to the car, leaving behind the computer device she used to communicate and all her clothing. They then drove back toward the border. After they left, Tammy's mother, Christina Wright, called the police and reported that Tammy had been abducted. Pet. App. 2a, 41a-45a.

Alerted to the police report, United States Customs officials stopped the group at the border. Because Tammy did not have her computer communication device, she could only communicate by nodding her head. In response to questions from Customs officials, Tammy indicated that she was afraid, that she was being taken against her will, and that she wanted to go back to Canada. Pet. App. 44a. A short time later, Canadian law enforcement officers arrived with Tammy's communication device. During further questioning, Tammy stated through the device that she wanted to go home to Winnipeg with Anthony, but that she did not want to go to Chicago. When then asked whether she wanted to be with Anthony or her mother, she replied that she wanted to be with her mother. She also told the Customs officers that

Anthony had told her that morning that he was taking her for a ride, but did not say where. *Id.* at 45a. After interviewing petitioners and Anthony DeSilva, Customs officials sent Tammy back to Canada and allowed DeSilva, petitioners, and Schon to return to the United States. *Id.* at 2a-3a, 46a.

2. The Province of Manitoba, Canada, charged Anthony DeSilva, petitioners, and Schon with kidnapping and forcible seizure. The Canadian government then made a formal request under the extradition treaty between the two countries for petitioners', DeSilva's and Schon's, extradition. Pet. App. 17a. That treaty requires in part that the offense on which extradition is sought must be "conduct which constitutes an offense punishable by the laws" of both countries. *Id.* at 50a. See Treaty on Extradition, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 985; Protocol Amending the Treaty on Extradition, Jan. 11, 1988, U.S.-Can., 27 I.L.M. 423.

A magistrate judge in the Northern District of Illinois found that petitioners and Anthony DeSilva were subject to extradition under the treaty. Pet. App. 34a-83a. The magistrate judge first found that the offenses on which Canada sought extradition were punishable as kidnapping under both federal and Illinois law. *Id.* at 52a-53a. The magistrate judge rejected petitioners' contention that because Anthony DeSilva was Tammy's guardian, his actions would have been lawful in Illinois and thus that the extradition request failed to satisfy the requirement of dual criminality. The magistrate judge acknowledged that had the events in question occurred wholly in Illinois, Anthony DeSilva would not have committed a crime, because Illinois law expressly provides that the consent of a legal guardian is an absolute defense to a

kidnapping charge. The court held, however, that the proper inquiry under the dual criminality provision of the treaty is whether a person appointed as a legal guardian in Canada would violate Illinois kidnapping law by abducting his ward from Illinois and attempting to transport her to another country. *Id.* at 56a.

After analyzing Illinois law, the magistrate judge held that "[w]hile an Illinois court might defer to a Canadian guardianship appointment as a matter of comity, and an Illinois prosecutor might decline to prosecute kidnapping charges against a foreign guardian in these circumstances, these are discretionary determinations." Pet. App. 60a. Thus, because a foreign guardianship order would not be an "absolute bar to criminal proceedings," petitioners' and DeSilva's conduct would be "punishable" under Illinois law within the meaning of the extradition treaty. *Ibid.*

The magistrate judge also held that the extradition request established probable cause to believe that DeSilva and petitioners had committed kidnapping. In particular, the magistrate judge found sufficient evidence that Tammy DeSilva was confined and transported against her will and that she was transported without legal authority. Pet. App. 62a-70a. The magistrate judge found, however, that the extradition request did not show probable cause for the extradition of the nurse, Judith Schon. *Id.* at 82a.

3. Petitioners and DeSilva then filed a petition for habeas corpus challenging their extradition.[1] The

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[1] While proceedings on the extradition request were pending in the Northern District of Illinois, petitioners filed an original action in the United States District Court for the District of Columbia challenging the constitutionality of the extra-

district court granted the petition. Pet. App. 12a-33a. The court held that the extradition request failed to satisfy the "dual criminality" treaty requirement that the conduct at issue must be "an offense punishable by the laws" of both the United States and Canada. *Id.* at 18a. In particular, the district court disagreed with the magistrate judge over the effect that Illinois courts would accord to a Canadian guardianship order. The district court explained that "Illinois would recognize a valid Canadian guardianship, and so a Canadian guardian—like an Illinois guardian—would be incapable of kidnapping his ward from Illinois. Thus, since the guardians' conduct would not be criminal in Illinois, the dual criminality requirement of the Treaty is not met." *Id.* at 33a.

4. The court of appeals reversed. Pet. App. 1a-11a. The court expressed "doubt that Illinois would look with equanimity on someone who tried to remove a disabled person from the state to a foreign country, on the basis of an ex parte order issued by a foreign judge purporting to authorize acts within the territory of the United States—or for that matter on the basis of a guardianship proceeding from which U.S. citizens were automatically excluded." *Id.* at 7a.[2]

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dition statute, 18 U.S.C. 3184. The district court held that Section 3184 violates Article III of the Constitution and enjoined its application to petitioners. *LoBue* v. *Christopher*, 893 F. Supp. 65 (D.D.C. 1995). The court of appeals reversed without reaching the merits, finding instead that the district court lacked jurisdiction to hear petitioners' constitutional challenge. 82 F.3d 1081 (D.C. Cir. 1996).

[2] Petitioners contest (Pet. 8-9 & n.3) the court of appeals' suggestion that Anthony's guardianship order was somehow flawed, but as they concede (Pet. 9 n.3), this statement is "dictum."

The court did not decide that issue, however; instead, it found that the dual criminality requirement was satisfied because the conduct alleged in the extradition request violated the federal kidnapping statute, 18 U.S.C. 1201(a). Under that statute, the court held, the only issue was whether Tammy DeSilva was an "unconsenting person." Pet. App. 8a.

Relying on *Chatwin* v. *United States*, 326 U.S. 455 (1946), the court rejected petitioners' arguments that as Tammy's guardian, Anthony could consent on Tammy's behalf and that Tammy's incapacitation prevented her from having sufficient will to withhold consent. Under *Chatwin*, the court held, a federal court in a kidnapping prosecution "must decide whether the alleged victim was competent to exercise a rational will"; the State's decision to appoint a guardian is not conclusive of that issue. Here, the court concluded, the magistrate judge had found that the evidence submitted would permit a rational trier of fact to conclude that Tammy could exercise a rational will, and that she communicated a desire to remain in Winnipeg. Pet. App. 9a. The court also noted that, although the kidnapping statute contains an exception for minors abducted by their parents, it contains no exception for wards abducted by their guardians. *Id.* at 10a. The court concluded that "[a] guardian who moves an adult ward across state or national boundaries, against her will, * * * may be convicted of kidnapping." *Id.* at 10a-11a.

## ARGUMENT

Petitioners contend (Pet. 10-30) that the court of appeals erred in rejecting their claim that as a matter of law they could not be convicted of kidnapping because Anthony DeSilva was Tammy DeSilva's guard-

ian. In particular, they argue first that the court of appeals erred in not deferring to the Illinois state court's determination that Tammy was incompetent, and second that, in any event, a legal guardian is exempt from liability under the federal kidnapping statute for abducting his ward. Neither contention merits review.

1. The extradition treaty between the United States and Canada provides in pertinent part that "[e]xtradition shall be granted for conduct which constitutes an offense punishable by the laws of both [the United States and Canada] by imprisonment or other form of detention for a term exceeding one year or any greater punishment." 27 I.L.M. at 423. That requirement, known as "dual criminality," requires the nation requesting extradition to show that the conduct that forms the basis for the extradition request is unlawful under federal law, the law of the state where the accused is found, or the law in a preponderance of states. See *Wright* v. *Henkel*, 190 U.S. 40, 61 (1903); *Cucuzzella* v. *Keliikoa*, 638 F.2d 105, 107 (9th Cir. 1981).

In this case, as the court of appeals concluded, petitioners' alleged conduct would violate the federal kidnapping law and thus supports petitioners' extradition to Canada. Pet. App. 10a-11a. The federal kidnapping statute provides in part as follows:

> Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by a parent thereof, when—(1) the person is willfully transported in interstate or foreign commerce; * * *

> shall be punished by imprisonment for any term of years or for life.

18 U.S.C. 1201(a). To establish a violation of this statute, the government must prove that a defendant (1) willfully transported in interstate commerce (2) an unconsenting person (3) who is held for ransom, reward, or otherwise. Pet. App. 82a; see *United States* v. *Lewis*, 115 F.3d 1531, 1535 (11th Cir. 1997), cert. denied, 118 S. Ct. 733 (1998); *United States* v. *Osborne*, 68 F.3d 94, 100 (5th Cir. 1995).

Petitioners contend that Tammy DeSilva was not an unconsenting person because the State of Illinois had determined that she was "incapable of having a recognizable will" and thus that she could not withhold consent. Pet. 13-14. They assert (*ibid*) that the court of appeals erred in holding that state law is of "no weight in resolving [the] issue of whether the alleged victim in a kidnapping case is of such age or mental state as to be incapable of having a recognizable will." That contention misapprehends both this Court's decision in *Chatwin* and the court of appeals' decision here.

In *Chatwin*, the defendants were convicted of kidnapping based on their transportation across state and international borders of a 15-year-old girl whom the parties stipulated had "a mental age of 7." 326 U.S. at 457. The Court reversed the conviction in part because "there [was] no competent or substantial proof that the girl was of such an age or mentality as necessarily to preclude her from * * * exercising her own free will, thereby making the will of her parents or the juvenile court authorities [which had taken custody of the girl prior to the kidnapping] the important factor." *Id.* at 461. In explaining this con-

clusion, the Court stated that it could not find as a matter of law or statutory interpretation that the girl was mentally incapable "in view of the general rule that incapacity is to be presumed only where a child is under the age of 14." *Ibid.* The Court also noted "parenthetically" that the law in the girl's state of residence, Utah, considered the consent of anyone over the age of 12 to be a defense to kidnapping. *Ibid.*

Finally, the Court rejected the government's argument that the girl's inability to consent had been shown by the fact that testing of the girl showed that she had a mental age of seven. The Court found "a complete absence of proof in the record as to the proper weight and significance to be attached to this particular mental age." 326 U.S. at 462. Thus, under the federal kidnapping statute, when the victim has been abducted from a legal guardian, "[t]here must be competent proof beyond a reasonable doubt of a victim's mental incapacity in relation to the very acts in question before criminal liability can be sanctioned in a case of this nature." *Ibid.*

In *Chatwin*, the victim's legal guardian claimed the right to withhold consent on behalf of the victim; here DeSilva claims the right to grant consent on behalf of the alleged victim. That distinction is irrelevant, however, to the dual criminality inquiry. *Chatwin* makes clear that even when an alleged victim has a legal guardian, the question whether the victim consented to interstate or international transportation remains a factual element of the offense. Although evidence that a State has appointed a guardian for the victim or that the victim has been found incompetent may be admissible and probative on that issue, it is not conclusive where, as here, there is other evidence from which a jury can find that the

victim did not consent. Here, as the court of appeals summarized, the evidence in the record could support a conclusion that "[Tammy] resisted Anthony when he took her from her home, and that she communicated intelligibly and rationally with U.S. customs officials when they asked her to choose between returning to Winnipeg or traveling with Anthony to Chicago." Pet. App. 9a. In such cases, *Chatwin* makes clear that a legal guardian can be convicted of kidnapping under the federal statute. Therefore, a jury could have found that DeSilva's and petitioners' conduct violated the federal kidnapping statute if it had occurred in the United States, and the dual criminality requirement has been satisfied.

Petitioners further argue (Pet. 16-18) that the court of appeals' interpretation of the federal kidnapping statute conflicts with decisions of the Eighth and Tenth Circuits, which, they assert, follow state family law. See *United States* v. *McCabe*, 812 F.2d 1060 (8th Cir.), cert. denied, 484 U.S. 832 (1987); *United States* v. *Floyd*, 81 F.3d 1517 (10th Cir.), cert. denied, 117 S. Ct. 144 (1996). Neither case supports that contention. In *McCabe*, the kidnapping victim was a 23-month-old infant, and the court of appeals rejected the defendant's contention that the government had failed to prove that the child lacked a "recognizable will." 812 F.2d at 1061. Contrary to petitioners' characterization, however, the court of appeals did not rely on state law to reach that conclusion; indeed, the court's discussion of that issue does not mention the law of the State where the kidnapping occurred. Instead, the court relied on this Court's statement in *Chatwin* that children under a certain age are presumed not to have a recognizable will. *Ibid.*

*Floyd* is even farther afield. In that case, the defendant claimed that he could not be guilty of kidnapping because he was the victim's "surrogate parent" and thus fell within the kidnapping statute's exception for parents who kidnap their minor children. 81 F.3d at 1520. The court held that a "surrogate parent" was immune from criminal liability under the statute, but it found that as a factual matter, the defendant was not a "surrogate parent" to the victim at the time the kidnapping occurred. To reach that conclusion, the court relied in part on the fact that the defendant had "voluntarily relinquished custody" of the child to the Oklahoma Department of Human Services, *id.* at 1524, but the court never looked to Oklahoma law to determine the defendant's status as a parent. *Id.* at 1519-1527.

2. Petitioners also contend (Pet. 18-21) that the dual criminality requirement cannot be satisfied in this case because the federal kidnapping statute does not prohibit the abduction of a person by that person's legal guardian. Petitioners argue that the statute's exemption of parents from liability for kidnapping their minor children includes an exemption for those who stand in loco parentis, which in turn includes a further exemption for legal guardians. Pet. 19.

The short answer to petitioners' contention is that the language of the statute contains no exception for legal guardians who abduct their adult wards. If Congress had wished to include such an exemption, it could easily have done so, but the court of appeals was not free to read such an exemption into the statute to satisfy petitioners' conception of appropriate policy.

See *Commissioner* v. *Lundy*, 516 U.S. 235, 252 (1996); *United States* v. *Yermian*, 468 U.S. 63, 73 n.13 (1984).[3]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1998

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[3] Petitioners assert (Pet. 20) that the court of appeals' decision conflicts with the Tenth Circuit's decision in *Floyd*, which interpreted the word "parent" in the statute to include those who stood in loco parentis to a minor. Whatever the merits of that decision, it cannot be read to hold or suggest that the word "parent" includes legal guardians and that the word "minor" includes adults adjudged incompetent. Both words would have to be defined in that way for petitioners' contention to prevail.

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NO. 97-1690

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

ANTHONY J. LOBUE AND THOMAS KULEKOWSKIS,
*Petitioners*,

v.

JOSEPH G. DILEONARDI, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

# REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE
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ANTHONY J. LOBUE AND THOMAS KULEKOWSKIS,
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*Respondent.*

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# REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioners respectfully submit this reply brief in support of their petition for a writ of certiorari. For the reasons given below, a grant of certiorari or, in the alternative, summary reversal is warranted with respect to each of the questions presented.

## I. THE QUESTION WHETHER LEGAL GUARDIANS, LIKE PARENTS, ARE EXEMPT FROM THE FEDERAL KIDNAPPING STATUTE

The government concedes that the following facts are undisputed. One, Tammy DeSilva suffered "severe brain injury" in an auto accident. Gov't Brief at 2. Two, Tammy's husband, Anthony, was appointed

legal guardian over her person and affairs. *See id.* Three, Anthony brought a tort action on her behalf so that she could recover damages for the accident that disabled her. *See id.* Four, Anthony attempted to transport his wife and ward to Illinois because the litigation "required Tammy to undergo a medical examination." *Id.* This set of facts describes the progress of a guardianship – not the course of a kidnapping.

It is inconceivable that Congress intended to label the transportation of a ward by a guardian who (like Anthony here) is legally endowed with custody over her person a "kidnapping." The government (following the Seventh Circuit decision below) argues that the federal kidnapping statute must apply to legal guardians simply because it does not exempt them by name. *See* Gov't Brief at 12. But this Court has stated, directly to the contrary, that both "parents [and] *legal guardians*" are exempt from the statute's reach. *Chatwin*, 326 U.S. 455, 460 (1946) (emphasis supplied). The Tenth Circuit reached the same conclusion in *United States v. Floyd*, 81 F.3d 1517, 1523-24 (10th Cir. 1996).

The Seventh Circuit's decision below thus both warrants summary reversal pursuant to *Chatwin*, and, along with the Tenth Circuit's decision in *Floyd*, creates a significant Circuit split.

## II. THE QUESTION WHETHER A FEDERAL COURT IN A PROSECUTION FOR KIDNAPPING MUST DEFER TO RELEVANT STATE FAMILY LAW

The government now claims that, under *Chatwin,* consent in a federal kidnapping prosecution is always a fact question, as to which state family law (even, as here, an individualized state court order) somehow plays only an evidentiary, and not a legal, role, so that it cannot be dispositive. Gov't Brief at 10-11. However, *Chatwin*'s careful discussion of state law – which properly treats that law as what it is, law, not trial evidence – rebuts the government's claim, and shows why summary reversal, or a grant of certiorari, is appropriate here.

In *Chatwin*, the Court held that Utah law did *not* hold the minor at issue to be incapable of exercising the power of consent based on her age alone. Because Utah law did not supply a clear rule of decision, the Court next looked to the majority rule among the States – on the assumption that Utah would follow it. The Court found that the majority rule in the States, like the rule in Utah, did *not* invalidate the consent of the minor at issue based on her age alone. *Only then* – after exhausting the relevant sources of state law, and finding that none was dispositive – did the Court turn to a factual inquiry as to whether the minor had consented to be transported.

In summary, *Chatwin* affirmatively mandates the application of relevant state law, and allows a factual inquiry to be conducted by the federal court only as a fallback, when no state law applies. It would thus turn *Chatwin* on its head to read it – as do the government and the decision below, *see* Gov't Brief at 10-11 – as an invitation to federal courts to re-adjudicate, as a matter of fact, domestic relations issues previously resolved as a matter of law by state legislators and judges.

The government's faulty interpretation of *Chatwin* would, if adopted, improperly constrict the proper Constitutional role of the States. State law on custody, capacity, and competence deserves to be accorded full deference by a federal court, because domestic relations is the quintessential province of state law. This case itself well illustrates the hazards of imposing federal "logic" on the "page of history" that constitutes state domestic relations law. *See* Petition at 11, 27.

The government's interpretation of *Chatwin* would also, if adopted, wreak havoc with the duties and expectations created by state domestic relations law. A guardian must be able to rely on the state court order that empowers him, and shifts decisionmaking power from ward to guardian, when he makes difficult decisions on behalf of his incompetent ward with respect to travel. Yet the government's interpretation of *Chatwin* would prevent a guardian from *ever* fully doing so.

Following the Seventh Circuit's decision below, the government interprets *Chatwin* to mean that evidence of an *interval of lucidity* on the part of the ward can trump a valid state court guardianship order, and change transportation into kidnapping. Gov't Brief at 11.[1] Thus, under the government's view, a layperson guardian who – like Anthony and many other relatives and caretakers of incompetent adults – lacks psychiatric training must nevertheless be able to accurately judge whether his ward is, for a brief period, sufficiently lucid that his appointment as her guardian is suspended, so that she may make her own decisions. If the guardian is wrong, he faces a possible federal prosecution.

It is no answer to say that the guardian should simply defer to the ward's wishes whenever the ward seems as if she might be sufficiently lucid that she can make her own decisions. If the guardian adopts this strategy to avoid criminal prosecution, he only risks disserving the interests of his incompetent ward (who may, as here, have an important interest that requires

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[1] Here, for example, the government claims that Tammy "communicated intelligibly and rationally with U.S. Customs officials" over a brief period, and that Anthony therefore may be subjected to criminal prosecution. Gov't Br. at 11. In fact, Tammy's answers to Customs officials were disjointed and contradictory. Petition at 4. Moreover every court and doctor to address the issue has found Tammy to be *permanently* incapable of responsibly making her own decisions. *Id.* at 2. This was, of course, the reason that she was adjudicated incompetent, and assigned a guardian, in the first instance.

travel). Thus, the government offers the guardian not just a trap for the layperson, but also a Hobson's Choice.

Anthony's situation illustrates this point. According to the government, to avoid criminal prosecution, Anthony should have deferred to Tammy's on-the-spot protests against travel for the required medical exam – despite that fact that she had been previously adjudicated incompetent due to severe brain injury, and despite the state court's guardianship order. But this is no solution. If Anthony had taken the government's advice, he would have risked a dismissal of the tort suit that he had brought on Tammy's behalf, on the ground that she had not appeared for the required medical examination. Such a dismissal would, in turn, have meant that Anthony had failed his severely disabled wife and ward. It would also have exposed Anthony to the risk that he would lose his guardianship, and face potentially huge civil liability, for breach of his fiduciary duty to oversee Tammy's financial affairs. The job of the guardian of an incompetent ward, who must often act in the ward's best interest despite vocal protests and recriminations, is difficult enough without impossible choices like those the government would impose.

The deference to state law that is mandated by *Chatwin*, *McCabe*, and *Floyd* obviates the need for this Hobson's Choice. Like *Chatwin*, *McCabe* and *Floyd* plainly defer to state law – contrary to the government's

claim. *McCabe* cites four state court decisions; it also cites to that part of *Chatwin* that discusses state law. *United States v. McCabe*, 812 F.2d 1060, 1061-62 (8th Cir. 1987). *Floyd*, for its part, applied Oklahoma domestic relations law to fact when it concluded that the defendant had lost legal custody when he voluntarily relinquished his ward to a state agency. 81 F.3d at 1525. These Eighth and Tenth Circuit decisions thus create a direct, significant split with the Seventh Circuit decision below, on the question whether a federal court should defer to state domestic relations law in a prosecution pursuant to the federal kidnapping statute.

For these reasons, with respect to the federalism issue here – as with respect to the interpretation of the federal kidnapping statute – the decision below both flouts *Chatwin* and creates a significant Circuit split.

## CONCLUSION

The federal kidnapping statute was not intended to authorize prosecutions of court-appointed guardians for transporting the very wards over which they have legal custody. Nor was it intended to allow unelected federal judges to overrule the will of state judges, state legislatures, and local communities on domestic relations issues, by ignoring applicable state law on custody, capacity and consent. In our federal system, the intimate familial sphere of domestic relations is, and should remain, the quintessential province of state law. Summary reversal or, in the alternative, a grant of certiorari is therefore appropriate here.

Respectfully submitted,

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